

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 117.

THE NORTHERN PACIFIC RAILWAY COMPANY, ALBION
McDONALD, AND AGNES AUCHARD, AS ADMINIS-
TRATRIX, WITH THE WILL ANNEXED, OF DAVID
AUCHARD, DECEASED, APPELLANTS,

vs.

JOHN TRODICK.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

FILED DECEMBER 19, 1908.

(21,452.)

(21,452.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 656.

THE NORTHERN PACIFIC RAILWAY COMPANY, ALBION
MCDONALD, AND AGNES AUCHARD, AS ADMINIS-
TRATRIX, WITH THE WILL ANNEXED, OF DAVID
AUCHARD, DECEASED, APPELLANTS,

vs.

JOHN TRODICK.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

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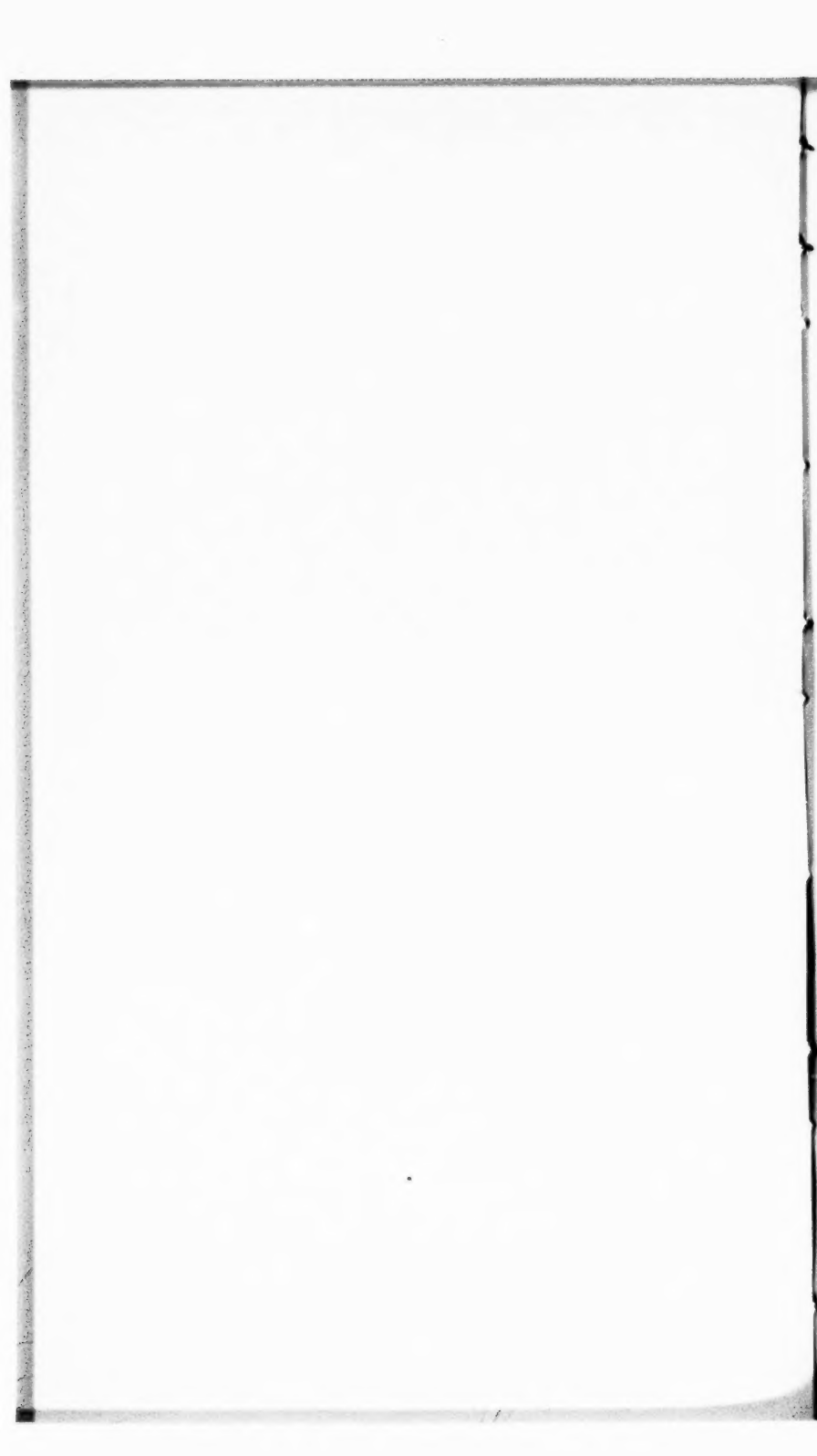
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No. 1563

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOHN TRODICK,

vs.

Appellant,

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and ALBION McDONALD, and AGNES AUCHARD, as Administratrix with the Will Annexed of DAVID AUCHARD, Deceased,
Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District of Montana.

Names and Addresses of Attorneys.

APPEARANCES:

Messrs. WALSH & NOLAN,
Helena, Montana,
Solicitors for John Trodrick, Appellant.

WM. WALLACE, Jr., Esq.,
Helena, Montana,
Solicitor for N. P. Ry. Co., Appellee.
and

MASSENA BULLARD, Esq.,
Helena, Montana,
Solicitor for Agnes Auchard, Admr., Appellee.

*In the Circuit Court of the United States, Ninth Cir-
cuit, District of Montana.*

IN EQUITY.—No. 702.

JOHN TRODICK,

Complainant,

vs.

**NORTHERN PACIFIC RAILWAY COMPANY,
et al.,**

Defendants.

Be it remembered, that on the 14th day of March, A. D. 1904, the complainant filed his bill of complaint herein, which is entered of final record, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

JOHN TRODRICK,

Complainant,

vs.

**NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES AU-
CHARD, as Administratrix with the Will An-
nexed of DAVID AUCHARD, Deceased,
Defendants.**

Bill of Complaint in Equity.

To the Honorable Judges of the Circuit Court of the United States, District of Montana:

Your orator, John *Trodrick*, brings this bill of complaint against the above-named defendants, and your orator complains and says:

I.

That your orator is a resident and citizen of the State of Montana, and that the defendants, Albion McDonald and Agnes Auchard, as administratrix with the will annexed of David Auchard, deceased, are residents and citizens of the State of Montana.

II.

Your orator alleges that the Northern Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and as such succeeded, prior to the commencement of this action, to whatever right, title, or

claim the Northern Pacific Railroad Company had, if any, to the land hereinafter more particularly described.

III.

Your orator further shows that the Northern Pacific Railroad Company was created by an Act of Congress, approved July 21st, 1864 (Chap. 217), granting lands in aid of the construction of a railroad and telegraph line from Lake Superior to the Puget Sound on the Pacific Coast by the northern route and by the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

IV.

Your orator further shows that the Northern Pacific Railroad Company duly accepted, in writing, the terms of the Act of Congress, and on the 29th day of December, A. D. 1864, such acceptance was served on the President of the United States.

V.

Your orator further shows that the Northern Pacific Railroad Company fixed the general route of its road extending coterminous with said land, hereinafter described, and within forty miles thereof, by filing a plat of such route with the Commissioner of the General Land Office on the 20th day of August, 1873.

VI.

Your orator further shows that, thereafter, on — day of —, 1873, the Commissioner of the General Land Office transmitted to the Receiver and Register of the Land Office for the District of Hel-

ena, in the State of Montana, in which District the land hereinafter described, the following letter of instructions:

“Gentlemen: The Northern Pacific Railroad Company having filed in this department a map showing the general route of their main line, from Lake Superior to Puget Sound, on the Pacific Coast, I have caused to be prepared a diagram which is herewith transmitted, showing the forty-mile limit of the land grant along said line, extending through your district, and you are hereby directed to withhold from sale or entry all the odd-numbered sections falling within these limits. The even sections are increased in price to \$2.50 per acre, subject to pre-emption and homestead entry only.

This withdrawal takes effect from August 15th, 1873, the date when the map was filed by the company with the Secretary of the Interior, as required by the 6th section of the Act of July 2d, 1864, organizing said company.”

VII.

Your orator further shows that the said letter of the Commissioner and the diagram therein referred to were received and filed in the local land office at Helena, State of Montana, the — day of —, 1873.

VIII.

Your orator further shows that the land hereinafter described was within and is within the forty-mile limit of the land granted as designated in the diagram.

IX.

Your orator further shows that on the 6th day of July, 1882, the Northern Pacific Railroad Company definitely located the line of its railroad, coterminous with said land, and within less than the forty miles of the land hereinafter described, by filing a plat of such line, approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office; and prior to November 18th, 1886, it constructed and completed a section of the forty miles of railroad and telegraph line, extending over the line of definite location and coterminous with the land hereinafter described.

X.

Your orator further shows that the President of the United States appointed three commissioners to examine the same, and the commissioners having performed their duty, reported to the Secretary of the Interior on the 18th day of November, 1886, that the lines were completed in all respects as required by the Act of Congress.

XI.

Your orator further shows that on the 30th day of November, 1886, the Secretary of the Interior transmitted the aforesaid report to the President of the United States with the recommendation that the railroad and telegraph lines be accepted, and on the 7th day of December, 1886, the President approved that recommendation.

XII.

Your orator shows that on the 10th day of May,

1895, the United States executed and delivered to the Northern Pacific Railroad Company its letters patent, purporting to convey to the company the tract of land hereinafter described under the terms and provisions of the said Act of Congress of 1864, and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

XIII.

Your orator further shows that in the year 1877, five years before the definite location of the road, one Martin Lemline went upon the land hereinafter described and occupied it, and either he, the said Lemline, or your orator has since continuously resided thereon. Your orator further shows that at the said time the said Martin Lemline was qualified to enter public lands under the Act of Congress, approved May 20th, 1862 (12 Stat. at L. 392, Chap. 95), entitled "An act to secure Homesteads to Actual Settlers on the Public Domain," and under the various acts supplemental thereto and amendatory thereof.

XIV.

Your orator further shows that the land hereinafter described when first occupied was unsurveyed, and was not surveyed until the year 1891, and, thereafter, your orator attempted to enter it under the homestead laws of the United States in the Land Office at Helena, Montana, the same being the proper United States District Land Office.

XV.

Your orator further shows that his application to enter said land was, however, rejected by the

Register and Receiver because, in their opinion, it conflicted with the grant to the Northern Pacific Railroad Company.

XVI.

Your orator further shows that he is now and ever since the year 1891 has been in the possession of that certain piece or parcel of land situate, lying and being in the County of Lewis and Clark, and State of Montana, and described as follows, to wit:

The southeast quarter of section number thirty-five (35), township number fifteen (15) north, range four (4) west, Helena Land District, and that his immediate grantor and predecessor in interest and possession, Martin Lemline, was in the possession of the aforesaid described land since the year 1877 up to the year 1891, and that in the year 1877 said Martin Lemline settled in good faith upon said land with a view and with the intent of acquiring title thereto under the public land laws of the United States of America and more particularly the act of May 20th, 1862, known as the Homestead Law, and that up to the year 1891 said Martin Lemline continued to live on said land, which said land was then unsurveyed, the township plat thereof not being filed until the year 1891, and your orator further avers that said land hereinabove described exceeds in value the sum of three thousand dollars (\$3,000.00).

XVII.

Your orator further shows that your orator claims the title to said land and said defendants claim an estate or interest therein adverse to your orator.

XVIII.

Your orator further shows that the claims of said defendants are without any right whatever, and said defendants have not any estate, right, title or interest whatever in said land or premises on any part thereof, except as herein set forth, and your orator avers that as to the interest said defendants Albion McDonald and Agnes Auchard, as administratrix of the last will of David Auchard, deceased, claims to have, that the same were acquired by them from the defendant, Northern Pacific Railway Company, with full knowledge and actual notice of the rights of your orator as herein set forth.

XIX.

Your orator further shows that he is a citizen of the United States over the age of 21 years and was such citizen of the United States and over the age of 21 years at the time that he attempted to enter the said land as hereinafter described as a homestead under the Homestead Laws of the United States, and that Martin Lemline, prior to the year 1877, and at all times up to the year 1891, was a citizen of the United States and over the age of 21 years. That your orator made an application to enter said land as a homestead under the acts of Congress in the proper United States Land Office, to wit: The Land Office at Helena, Montana. That the officials of the Land Department of the United States declined to permit your orator to enter said land, holding that under the Act of 1864, hereinbefore more particularly referred to, that the land above described was not a part of the public domain, but was a part of

and included in the grant to the predecessor of the defendant, the Northern Pacific Railroad Company. Your orator further shows that the sole and only question submitted to or decided by the officials of the Land Department of the United States was the question of the interpretation, effect and construction of the said Act of Congress of July 21st, 1864, and that upon and by virtue only of an erroneous construction and interpretation of said Act of July 21st, 1864, your orator was denied the right to enter said land as a homestead, and said denial of the right of your orator to enter said land as a homestead and said refusal to permit said land to be entered was for no other reason than as above set forth.

XX.

Your orator further shows that he is now ready and has always been and still is ready and willing to pay to the defendant, the Northern Pacific Railway Company or to the other defendants, such sum of money as the Court may find was expended by them or either of them in securing from the United States the patent to the land hereinbefore described, and your orator has always been and still is ready and willing to pay and hereby offers to pay the proportionate amount chargeable against said land as expenses of having the same patented to the said Railway Company by the United States, and, inasmuch as said land was patented to the said Northern Pacific Railroad Company, together with other land, your orator does not know what the proportionate

expenses are nor can your orator ascertain the same, although your orator has endeavored so to do, and for that reason your orator is unable to pay or bring into court a fixed or definite amount of money, but your orator avers that he is ready and willing to pay into court whatever amount shall be found due to said Railway Company as representing the amount expended by them in securing the patent for said land, and whatever amount is so found due to said defendant, the said Northern Pacific Railway Company or to the other defendants, your orator is ready and willing to pay.

XXI.

Your orator further shows that one David Auchard died on the 8th day of October, 1902, in Lewis and Clark County, State of Montana, and that said David Auchard, in his lifetime, made and published his last will, whereby he appointed the Grand Master of the Grand Lodge of Ancient, Free and Accepted Masons of the State of Montana, his executor, but that, for some reason unknown to your orator, said Grand Master of the Grand Lodge of Ancient, Free and Accepted Masons did not qualify as such executor, and, thereafter, on the 11th day of October, 1902, at Helena, the said will was proved and admitted to probate in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, and, thereafter, on the 11th day of October, 1902, Agnes Auchard was thereupon appointed administratrix with the said last will annexed, and on the said 11th day

of October, 1902, letters of administration with the said will annexed were issued on said will to the said Agnes Auchard by the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark.

XXII.

Your orator further shows that thereupon the said Agnes Auchard qualified and entered upon the discharge of her duties as such administratrix with the will annexed, and that said letters of administration with the will annexed have not been revoked, and are now in full force and effect, and she is now the duly appointed, qualified and acting administratrix with the will annexed of the estate and will of David Auchard, deceased.

Wherefore, your orator prays that the defendants may be required to set forth the nature of their claims, and all adverse claims of the defendants may be terminated by a decree of this Court, and that by said decree it be declared and adjudged that the defendants have no estate or interest whatever in and to said land, and that the title of your orator is good and valid, and that the defendants be forever enjoined and barred from asserting any claim to said land adverse to your orator.

That the patent heretofore issued to the said Northern Pacific Railroad Company be declared to be held in trust for your orator, and that your orator be adjudged and decreed to be the owner of said land, and that the said defendants be decreed to make, execute and deliver to your orator a deed of

conveyance of all the right, title and interest to the said land or that some person may be appointed by this Honorable Court to do this for said defendants, and that your orator may have further and other relief as the nature of the case may require, and in the meantime, that said defendants be enjoined from selling, conveying, transferring, mortgaging or otherwise incumbering or interfering with said land.

Forasmuch as your orator can have no plain, speedy or adequate relief except in this Court, and to the end, therefore, that said defendants be *required* to answer and make a full disclosure according to their best knowledge, remembrance, information and belief, and a full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived, to the end that the rights of the respective parties hereto may be established and fixed by a decree of this Court.

And may it please your Honors to grant unto your orator a writ of subpoena of the United States issuing out of and under the seal of this Honorable Court directed to said defendants, commanding them that by a certain day and under a certain penalty to be and appear in this Honorable Court, and then and there to answer to the premises and to stand to and abide by such order and decree as may be made against them and for costs of suit, and for such

other relief as to this Honorable Court shall seem meet and agreeable to equity.

And your orator will ever pray.

NOLAN & LOEB,

Solicitors for Complainant and of Counsel.

United States of America,

District of Montana,

County of Lewis and Clark,—ss.

John *Trodrick*, being first duly sworn, deposes and says:

That he is the complainant in the above-entitled action; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and facts therein stated are true of his own knowledge except as to those matters and facts stated on information and belief, and as to those he believes it to be true.

his

Witness to signature of JOHN X *TRODRICK*.

JOHN W. EDDY. mark

Subscribed and sworn to before me this 14th day of March, 1904.

[Notarial Seal]

JOHN W. EDDY,

Notary Public in and for Lewis and Clark County,
State of Montana.

[Endorsed]: Title of Court and Cause. Complaint in Equity. Filed Mar. 14th, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 14th day of March, 1904, a subpoena in equity was duly issued herein, which is entered of final record as follows, to wit:

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

IN EQUITY.

Subpoena in Equity.

The President of the United States of America, Greeting: To Northern Pacific Railway Company, Albion McDonald and Agnes Auchard as Administratrix with the Will Annexed of David Auchard, Deceased, Defendants:

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Helena, on the 4th day of April, A. D. 1904, to answer a Bill of Complaint exhibited against you in said court by John *Trodick* complainant, who is a citizen of the State of Montana, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 14 day of March, in the year of our Lord one thousand nine hundred and four and of our Independence the 128.

[Seal]

GEO. W. SPROULE,

Clerk.

By _____,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, SUPREME COURT U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday in April next, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

[Seal]

GEO. W. SPROULE,
Clerk.

By _____,
Deputy Clerk.

NOLAN & LOEB,

Solicitors for Complainant, Helena, Montana.

United States Marshal's Office,
District of Montana.

I hereby certify that I received the within writ on the 18th day of March, 1904, and personally served the same on the 19th & 21st day of March, 1904, by delivering to and leaving with said defendants named therein personally, at their res., in the county of Lewis & Clark in said District, a copy thereof.

HARRY L. BILLINGS,
U. S. Marshal.

By _____,
Deputy.

Mar. 22, 1904.

\$9.75.

Due service of within subpoena admitted as at Helena, Montana, on this 15th day of March, 1904.

NORTHERN PACIFIC RAILWAY COMPANY.

By WILLIAM WALLACE, Jr., its Division Counsel Hereto Duly Authorized.

[Endorsed]: No. 702. U. S. Circuit Court, Ninth Circuit, District of Montana. In Equity. *John Trodick vs. Nor. Pac. Ry. Co. et al.* Subpoena Filed Dec. 28th, 1904. Geo. W. Sproule, Clerk. By _____, Deputy Clerk.

State of Montana,
County of Lewis & Clark,—ss.

On this 21st day of March, 1904, personally appeared before me, Ralph Wells, a notary public, Harry L. Billings, who being duly sworn, deposes and says: That he personally served a copy of this subpoena on Albion McDonald and also a copy of this subpoena on Agnes Auchard, by showing to each of them the original subpoena and delivering to them a copy thereof, on this 21st day of March, 1904.

HARRY L. BILLINGS.

Subscribed and sworn to before me this 21st day of March, 1904.

[Seal]

RALPH WELLS,

Notary Public in and for Lewis and Clark County,
Montana.

And thereafter, to wit, on the 9th day of May, 1904, the separate answer of defendant Northern Pacific Railway Co. was filed herein, which is entered of final record as follows, to wit:

In the Circuit Court of the United States for the District of Montana.

JOHN TRODICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES
AUCHARD, as Administratrix, With the
Will Annexed, of DAVID AUCHARD, De-
ceased,

Defendants.

**Separate Answer of the Defendant Northern Pacific
Railway Company.**

This defendant now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in complainant's bill of complaint contained, for its separate answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to answer to, answering says:

I.

This defendant admits that the complainant, John Trodrick is a resident and a citizen of the State of Montana; but this defendant does not know, and can-

not set forth as to its belief or otherwise whether or not said defendants Albion McDonald and Agnes Auchard, as administratrix with the will annexed of David Auchard, deceased, are residents and citizens of the State of Montana.

II.

This defendant admits that the Northern Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin; and that said company had, prior to the commencement of this suit, succeeded to whatever right, title or claim the Northern Pacific Railroad Company had to the lands described in the bill of complaint.

III.

This defendant admits that the Northern Pacific Railway Company is a corporation created by an act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

IV.

This defendant admits that said Northern Pacific Railroad Company duly accepted in writing, the terms of said act of Congress, that said company, on December 29, 1864, served such acceptance on the President of the United States.

V.

This defendant admits that said Northern Pacific Railroad Company fixed the general route of its rail-

road opposite the land described in the bill of complaint; and this defendant says that the map showing the general route of said railroad line was filed in the office of the commissioner of the general land office on February 21, 1872; but this defendant denies that the land described in the bill of complaint was within forty miles of said line of general route.

VI.

This defendant admits that thereafter, and on April 22, 1872, the commissioner of the general land office transmitted to the register and receiver of the United States District land office at Helena, Montana, a letter substantially in the words set out in the sixth paragraph of complainant's bill of complaint.

VII.

This defendant admits that the letter and diagram referred to in said paragraph six of the bill of complaint was duly received and filed in the said land office at Helena on the 6th day of May, 1872.

VIII.

This defendant denies that the land described in the bill of complaint was within the forty-mile limits of the grant to said Northern Pacific Railroad Company, as shown by said diagram referred to in said paragraph six of the bill of complaint.

IX.

This defendant admits that on July 6, 1882, the Northern Pacific Railroad Company definitely located the line of its railroad coterminous with and within less than forty miles of the land described in the bill of complaint, by filing a plat thereof, duly ap-

proved by the Secretary of the Interior, in the office of the commissioner of the general land office; and defendant admits that before November 18, 1886, said Northern Pacific Railroad Company had constructed that section of its railroad and telegraph line, over the line of its definite location, coterminous with the land described in the bill of complaint.

X.

This defendant admits that the President of the United States appointed three commissioners to examine said completed section of its road, and that said commissioners, having performed their duty, reported that said railroad and telegraph lines were completed in all respects as required by said act of Congress of July 2, 1864; but this defendant denies that such report was made to the Secretary of the Interior on November 18, 1886, but alleges that said report was made and dated some time before August 27, 1883, the exact date being unknown to this defendant.

XI.

This defendant denies that on the 30th day of November, 1886, the Secretary of the Interior transmitted said report to the President of the United States, recommending that the railroad and telegraph lines be accepted and that the President of the United States on December 7, 1886, approved that recommendation; but this defendant alleges that the report of the commissioners who examined said section of completed road was, on August 27, 1883, transmitted by the Secretary of the Interior to the President of the United States, with the recommen-

dation that said railroad and telegraph lines be accepted, and that on September 7, 1883, the President of the United States approved that recommendation.

XII.

The defendant denies that the land described in the bill of complaint was patented to this defendant by the United States on May 10, 1895, but alleges that on January 10, 1903, the United States executed and delivered to this defendant its letters patent conveying the land described in the bill of complaint to this defendant under the terms and provisions of the act of Congress approved July 2, 1864, and the various acts of Congress supplemental thereto and amendatory thereof.

XIII.

This defendant does not know, and cannot set forth as to its belief or otherwise, whether or not in the year 1877, or at any time, one Martin Lemline went upon the land described in the bill of complaint and occupied it, or whether or not said Lemline or the complainant has, since said year 1877, or at any other time, continuously or otherwise, resided thereon; and this defendant denies that in the year 1877, or at any other time during the period of the alleged occupancy of said premises by said Lemline, said Lemline was qualified to enter public lands under the act of Congress approved May 20, 1862, entitled "An Act to secure homesteads to actual settlers on the Public Domain," or under the various acts supplemental thereto and amendatory thereof.

XIV.

This defendant admits that the land described in

the bill of complaint was unsurveyed until the year 1891; but this defendant does not know and cannot set forth, as to its belief or otherwise, what steps complainant took to enter said land under the homestead laws of the United States.

XV.

This defendant alleges that complainant made a pretended application to enter said land, and that said application was rightfully rejected by the register and receiver of said United States district land office because said application conflicted with the grant to said Northern Pacific Railroad Company; and this defendant further alleges that said application was rightfully rejected because at the date thereof said land had been disposed of by the United States, and said register and receiver had no jurisdiction or authority to receive any application therefor under any of the public lands laws of the United States.

XVI.

This defendant does not know and cannot set forth as to its belief or otherwise whether or not the complainant has, since the year 1891, or any other time, been in the possession of the land described in the complaint; and this defendant does not know and cannot set forth as to its belief or otherwise as to whether or not Martin Lemline was in possession of said land from the year 1877 to the year 1891, or at any other time, or at all; and this defendant denies that said Martin Lemline ever settled upon said land in good faith and with a view or intent of acquiring

title thereto under the homestead law or under any of the public land laws of the United States.

XVII.

This defendant does not know and cannot set forth as to its belief or otherwise as to whether or not said land is of the value of \$3,000.00.

XVIII.

This defendant denies that the said defendants Albion McDonald and Agnes Auchard, as administratrix of the last will of David Auchard, deceased, acquired their respective interests in and to said land from this defendant with full knowledge and notice or any knowledge or notice of any right to said land existing in said complainant.

XIX.

The defendant does not know, and cannot set forth as to its belief or otherwise, whether or not complainant was a citizen of the United States and over the age of 21 years at the time of his attempted and pretended application to enter said land under the homestead laws; and this defendant does not know, and cannot set forth as to its belief or otherwise, whether or not Martin Lemline was, before the year 1877 or up to the year 1891, or at all, a citizen of the United States or over the age of 21 years. This defendant admits that the complainant made a pretended application to enter the land described in the complaint, but alleges that said application was rightfully rejected by the register and receiver of the United States district land office at Helena, Montana, because said application conflicted with the grant to

said Northern Pacific Railroad Company; and this defendant further alleges that said application was rightfully rejected because at the date thereof said land had been disposed of by the United States, and said register and receiver had no jurisdiction or authority to receive any application therefor under any of the public land laws of the United States.

XX.

This defendant does not know, and cannot set forth as to its belief or otherwise, whether or not one David Auchard died October 8, 1902, or at all; and, further, this defendant does not know, and cannot set forth as to its belief, or otherwise, whether or not probate proceedings as set forth in paragraphs 21 and 22 of complainant's bill of complaint, or any probate proceedings, were had.

XXI.

This defendant, further answering, says, that on the 30th day of November, 1896, this defendant contracted to sell to one David Auchard the land described in the bill of complaint, and that thereafter, said Auchard having paid the full purchase price under said contract, a warranty deed, bearing date March 3, 1899, was executed and delivered by this defendant to said Auchard; and this defendant is informed and believes, and so states the fact to be, that said David Auchard was an innocent, *bona fide* purchaser of said land, without notice of the pretended claim asserted thereto by the complainant.

The defendant shows that by reason of the sale of said land to said David Auchard, as hereinbefore set forth, this defendant now has no right, title or claim

to said land, and that the only interest this defendant has in this suit is to protect the warranties contained in its said deed to David Auchard.

Further answering this defendant alleges that the land described in the bill of complaint was public land of the United States on July 2d, 1864, and on July 6th, 1882, when the line of definite location of the Northern Pacific Railroad opposite thereto was fixed, same land was public land of the United States, not reserved, sold, granted or otherwise appropriated, and not occupied by any homestead settler, and was free from pre-emption and other claims or rights and upon the definite location of said line, the said land passed to said Northern Pacific Railroad Company under the grant by said act of Congress of July 2d, 1864.

All of which matters and things this defendant is ready to aver and prove as this Court shall direct, and this defendant prays to be hence dismissed with its proper costs and charges in this behalf most wrongfully sustained.

NORTHERN PACIFIC RAILWAY COMPANY,

By WILLIAM WALLACE, Jr.,

Its Solicitors.

JAMES B. KERR,

M. I. SANDERS,

Of Counsel.

Received copy foregoing answer, May 9, 1904.

NOLAN & LOEB,

Solicitors for Comp.

[Endorsed]: Title of Court and Cause. Separate Answer Nor. Pac. Ry. Co. Filed and Entered May 9, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of July, 1904, the defendant Agnes Auchard, as administratrix, filed her separate answer herein, which is entered of final record as follows, to wit:

In the Circuit Court of the United States for the District of Montana.

JOHN TRODRICK,

Complainant,

vs.

**NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES AUCHARD,** as Administratrix, with the Will Annexed, of **DAVID AUCHARD,** Deceased,
Defendants.

Separate Answer of the Defendant, Agnes Auchard, Administratrix with the Will Annexed of the Estate of David Auchard.

This defendant now and at all times hereafter saving to herself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in complainant's bill of complaint contained, for her separate answer thereto, or to so much thereof as this defendant is advised it is material or necessary for her to make answer to, answering says:

I.

This defendant admits that the complainant, John *Trodrick*, and the defendant, Albion McDonald, and this answering defendant are residents and citizens of the State of Montana.

II.

This defendant admits that the Northern Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin; and that said company had, prior to the commencement of this suit, succeeded to whatever right, title or claim the Northern Pacific Railroad Company had to the lands described in the bill of complaint.

III.

This defendant admits that the Northern Pacific Railroad Company is a corporation created by an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

IV.

This defendant admits that said Northern Pacific Railroad Company duly accepted in writing the terms of said act of Congress, that said company, on December 29, 1864, served such acceptance on the President of the United States.

V.

This defendant admits that said Northern Pacific

Railroad Company fixed the general route of its railroad opposite the land described in the bill of complaint; and this defendant says that the map showing the general route of said railroad line was filed in the office of the Commissioner of the General Land Office on February 21, 1872; but this defendant denies that the land described in the bill of complaint was within forty miles of said line of general route.

VI.

This defendant admits that thereafter, and on April 22, 1872, the Commissioner of the General Land Office transmitted to the Register and Receiver of the United States District Land Office at Helena, Montana, a letter substantially in the words set out in the sixth paragraph of complainant's bill of complaint.

VII.

This defendant admits that the letter and diagram referred to in said paragraph sixth of the bill of complaint were duly received and filed in the said Land Office at Helena on the 6th day of May, 1872.

VIII.

This defendant denies that the land described in the bill of complaint was within the forty-mile limits of the grant to said Northern Pacific Railroad Company, as shown by said diagram referred to in said paragraph sixth of the bill of complaint.

IX.

This defendant admits that on July 6, 1882, the Northern Pacific Railroad Company definitely located the line of its railroad coterminous with and within less than forty miles of the land described in

the bill of complaint, by filing a plat thereof, duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office; and defendant admits that before November 18, 1886, said Northern Pacific Railroad Company had constructed that section of its railroad and telegraph line, over the line of its definite location, coterminous with the land described in the bill of complaint.

X.

This defendant admits that the President of the United States appointed three commissioners to examine said completed section of said company's road, and that said commissioners, having performed their duty, reported that said railroad and telegraph lines were completed in all respects as required by said act of Congress of July 2, 1864; but this defendant denies that such report was made to the Secretary of the Interior on November 18, 1886, but alleges that said report was made and dated some time before August 27, 1883, the exact date being unknown to this defendant.

XI.

This defendant denies that on the 30th day of November, 1886, the Secretary of the Interior transmitted said report to the President of the United States recommending that the railroad and telegraph lines be accepted, and that the President of the United States on December 7, 1886, approved that recommendation; but this defendant alleges that the report of the commissioners who examined said section of completed road was, on August 27, 1883, transmitted by the Secretary of the Interior to the

President of the United States, with the recommendation that said railroad and telegraph lines be accepted, and that on September 7, 1883, the President of the United States approved that recommendation.

XII.

This defendant denies that the land described in the bill of complaint was patented to the defendant, Northern Pacific Railway Company, by the United States on May 10, 1895; but alleges that on January 10, 1903, the United States executed and delivered to said company its letters patent conveying the land described in the bill of complaint to said company under the terms and provisions of the act of Congress approved July 2, 1864, and the various acts of Congress supplementary thereto and amendatory thereof.

XIII.

This defendant does not know, and cannot set forth as to her belief or otherwise, whether or not in the year 1877, or at any time, one Martin Lemline went upon the land described in the bill of complaint and occupied it, or whether or not said Lemline or the complainant has, since said year 1877, or any other time, continuously or otherwise, resided thereon; and this defendant denies that in the year 1877, or at any other time during the period of the alleged occupancy of said premises by said Lemline, said Lemline was qualified to enter public lands under the act of Congress approved May 20, 1862, entitled "An Act to secure Homesteads to actual Settlers on the Public Domain," or under the various acts supplemental thereto and amendatory thereof.

XIV.

This defendant admits that the land described in the bill of complaint was unsurveyed until the year 1891; but this defendant does not know and cannot set forth, as to her belief or otherwise, what steps complainant took to enter said land under the homestead laws of the United States.

XV.

This defendant alleges that complainant made a pretended application to enter said land, and that said application was rightfully rejected by the Register and Receiver of said United States District Land Office, because said application conflicted with the grant to said Northern Pacific Railroad Company; and this defendant further alleges that said application was rightfully rejected because at the date thereof said land had been disposed of by the United States, and said Register and Receiver had no jurisdiction or authority to receive any application therefor under any of the public land laws of the United States.

XVI.

This defendant does not know and cannot set forth as to her belief or otherwise whether or not the complainant has, since the year 1891, or any other time, been in the possession of the land described in the complaint; and this defendant does not know and cannot set forth as to her belief or otherwise as to whether or not Martin Lemline was in possession of said land from the year 1877 to the year 1891, or at any other time, or at all; and this defendant denies that said Martin Lemline ever settled upon said land

in good faith and with a view or intent of acquiring title thereto under the homestead law or under any of the public land laws of the United States.

XVII.

This defendant does not know and cannot set forth as to her belief or otherwise as to whether or not said land is of the value of \$3,000.00.

XVIII.

This defendant denies that the said defendant, Albion McDonald, and this defendant acquired their respective interests in and to said land from the defendant, Northern Pacific Railway Company, with full knowledge or notice or any knowledge or notice of any right to said land existing in said complainant.

XIX.

This defendant does not know, and cannot set forth as to her belief or otherwise, whether or not complainant was a citizen of the United States and over the age of twenty-one years at the time of his attempted and pretended application to enter said land under the homestead laws; and this defendant does not know, and cannot set forth as to her belief or otherwise, whether or not Martin Lemline was, before the year 1877 or up to the year 1891, or at all, a citizen of the United States or over the age of twenty-one years. This defendant admits that the complainant made a pretended application to enter the land described in the complaint, but alleges that said application was rightfully rejected by the Register and Receiver of the United States District Land Office at Helena, Montana, because said application

conflicted with the grant to said Northern Pacific Railroad Company; and this defendant further alleges that said application was rightfully rejected because at the date thereof said land had been disposed of by the United States, and said Register and Receiver had no jurisdiction or authority to receive any application therefor under any of the public land laws of the United States.

XX.

This defendant admits each and every allegation contained in paragraphs XXI and XXII in said complainant's bill of complaint, save and except that this defendant alleges that the said David Auchard died on the eighth day of September, 1902, and not on the eighth day of October, 1902, as alleged in said complainant's bill of complaint.

XXI.

This defendant further answering says that on the thirtieth day of November, 1896, the said Northern Pacific Railway Company contracted to sell to the said David Auchard the land described in the bill of complaint, and that thereafter, said David Auchard having paid the full purchase price under said contract, a warranty deed, bearing date March 3, 1899, was executed and delivered by the said defendant, Northern Pacific Railway Company, to the said David Auchard, and that the said David Auchard was an innocent bona fide purchaser of said land without notice of the pretended claim asserted there-to by the complainant, and that this defendant, as administratrix, with the will annexed, of the estate of said David Auchard, deceased, is entitled to said land

and the possession thereof as against the said complainant and all persons claiming through, by or under the said complainant.

Further answering this defendant alleges that the land described in the bill of complaint was public land of the United States on July 2, 1864, and on July 6, 1882, when the line of definite location of the Northern Pacific Railroad Company opposite thereto was fixed, same land was public land of the United States, not reserved, sold, granted or otherwise appropriated and not occupied by any homestead settler, and was free from pre-emption and other claim or rights, and upon the definite location of said line, the said land passed to said Northern Pacific Railroad Company under the grant by said act of Congress of July 2, 1864.

All of which matters and *thing* this defendant is ready to aver and prove as this Court shall direct, and this defendant prays to be hence dismissed with her proper costs and charges in this behalf most wrongfully sustained; and that the complainant be adjudged to be without any right, title, interest or claim in said described lands or any part thereof.

AGNES AUCHARD,

MASSENA BULLARD,

Solicitor and Counsel for Defendant, Agnes Auchard, as Administratrix with the will annexed, of David Auchard, deceased.

Service of foregoing answer accepted and copy received this 6th day of July, 1904.

NOLAN & LOEB,

Solicitors and of Counsel for Complainant.

[Endorsed]: Title of Court and Cause. Separate Answer of Agnes Auchard, Administratrix with the Will Annexed of David Auchard, Deceased. Filed and Entered July 7, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 23d day of July, 1904, the complainant filed his replication to the answer of Agnes Auchard, administratrix, herein, which is entered of final record as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

JOHN TRODRICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES AUCHARD, as Administratrix with the Will Annexed of DAVID AUCHARD, Deceased,
Defendants.

Complainant's Replication to Answer of Agnes Auchard.

This replicant, John Trodrick, saving and reserving to himself all and all manner of advantages of exception which may be had or taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant Agnes Auchard, administratrix with the will annexed of the estate of David Auchard, deceased, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain and sufficient in the law to be answered

unto by the said defendant, and that all the answer of said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, conferred or avoided, traversed or denied, is true; all of which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed.

NOLAN & LOEB,
Solicitors for Complainant.

[Endorsed]: Title of Court and Cause, etc. Replication. Filed and entered July 23, 1904, Geo. W. Sproule, Clerk.

Service of within replication admitted July 22, 1904.

MASSENA BULLARD,
Atty. for Deft.

And thereafter, to wit, on the 23d day of July, 1904, the complainant filed his replication to the answer of Northern Pacific Railway Company herein, which is entered of final record as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

JOHN TRODRICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES AU-
CHARD, as Administratrix with the Will An-
nexed of DAVID AUCHARD,

Deceased.

Complainant's Replication to Answer of Northern Pacific Railway Company.

This replicant, John Trodrick, saving and reserving to himself all and all manner of advantages of exception which may be had or taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, Northern Pacific Railway Company, for replication thereunto saith that he doth and will aver, maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that all the answer of said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the

said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed.

NOLAN & LOEB,
Solicitors for Complainant.

[Endorsed]: Title of Court and Cause, etc. Replication. Filed and entered July 23, 1904. Geo. W. Sproule, Clerk. Filed nunc pro tunc as of date May 30, 1904, as per order of Court dated Sept. 20, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 18th day of July, A. D. 1907, a final decree was duly made and entered herein, which said decree is entered of final record herein, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

JOHN TRODRICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES AU-
CHARD, as Administratrix with Will An-
nexed of DAVID AUCHARD, Deceased.

Decree.

This cause having come on to be heard this 18th day of July, A. D. 1907, upon pleadings and proofs, and Mr. A. I. Loeb having been heard on the part of the complainant, and Messrs. Wallace & Donnelly and Mr. Massena Bullard having been heard on the part of the defendants, and due deliberation having been had, it is ordered, adjudged and decreed that the said bill of complaint herein be and the same is hereby dismissed with costs to the defendants, to be taxed in the sum of ——— dollars.

WILLIAM H. HUNT,

Judge.

Dated this 18th day of July, 1907.

[Endorsed]: Title of Court and Cause. Decree.
Filed and entered July 18, 1907. Geo. W. Sproule,
Clerk.

Clerk's Certificate to Pleadings, etc.

Whereupon, said pleadings, process and final decree are entered of final record herein in accordance with the law and the practice of this court.

Witness my hand and the seal of said Court at Helena, Montana, this 18th day of July, A. D. 1907.

[Seal]

GEO. W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy Clerk.

That on the 3d day of July, A. D. 1905, a transcript of the testimony taken before the Examiner in said cause was filed herein, being in the words and figures following, to wit:

Testimony Before Examiner.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

No. 702.

JOHN TRODDICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY
et al.,

Defendants.

This cause came on for hearing before Henry N. Blake, Examiner, under the following order of the above-entitled court, made and entered September 20th, 1904:

Order Referring Cause to Examiner.

“And thereupon, upon motion of counsel for complainant, it is ordered that the ninety days for the taking of the testimony herein commence from this date, September 20th, 1904.

“And thereupon, upon motion of counsel for complainant, it is ordered that this cause be referred to H. N. Blake, Examiner, to take the testimony in this cause, and report the same to this court.”

Messrs. Nolan & Loeb appeared for the complainant, and William Wallace, Junior, Esq., appeared for the Northern Pacific Railway Company, and Mas-

sena Bullard, Esq., and Messrs. Carpenter, Day & Carpenter appeared for the defendant Agnes Auchard, as administratrix with the will annexed of David Auchard, Deceased, and Albion McDonald appeared in person.

Whereupon, by agreement of the parties, R. F. Gaines was appointed stenographer to take the testimony in shorthand and transcribe the same.

It was also stipulated that the United States courtroom in Helena, Montana, should be the place for the taking of the said testimony.

And thereupon the following stipulation was offered in evidence:

Stipulation for Amendment of Bill of Complaint.

“It is hereby stipulated and agreed by and between the solicitors for the complainant and the defendants herein:

I.

That paragraph three of the bill of complaint herein be amended so that the date therein given as July 21st, 1864, be amended to read July 2, 1864.

II.

That the date given in paragraph five be amended and changed to the 21st day of February, 1872, instead of the 20th day of August, 1873.

III.

That the date in paragraph six given be changed to the 22d day of April, 1872, instead of the date as given in paragraph six.

IV.

That the blank in paragraph seven of said bill of

complaint be filled in and changed so as to read the sixth day of May, 1872, instead of 1873.

V.

That the date in paragraph ten given be changed so that the date, the 18th day of November, 1886, be stricken out and in lieu thereof the date inserted as "before August 27th, 1883, the exact date unknown."

VI.

That paragraph eleven be changed so as to show that the report was made August 27th, 1883, and the recommendation approved September 7, 1883, instead of December 7th, 1886, as in paragraph eleven of the bill of complaint not shown.

VII.

That the date of issuing patent, as alleged in paragraph twelve, be changed to January 10th, 1903, instead of the 10th day of May, 1895, as now shown.

VIII.

That in paragraph nineteen that the act of Congress referred to therein as being an act of Congress of July 21st, 1864, be changed so as to read July 2d, 1864.

Dated November 21st, 1904.

(Signed) NOLAN & LOEB,
Solicitors for Complainant.
WILLIAM WALLACE, Jr.,
CHARLES DONNELLY,
JAMES B. KERR,

Solicitors for Northern Pacific Ry. Co.
MASSENA BULLARD,

Solicitors for Defendant Agnes Autchard as Exec-
utrix of the Will of Autchard, Deceased.

Whereupon the complainant produced JOHN W. EDDY, who being sworn, testified as follows:

Mr. WALLACE.—With the permission of the Master, Mr. McDonald desires that any objections interposed by the Northern Pacific Railway Company, defendant, so far as applicable be deemed interposed for him personally also.

The EXAMINER.—All right; let the record so show.

Mr. BULLARD.—Let the same appear in behalf of the defendant Agnes Autchard, administratrix. There is no occasion for repeating these objections.

The EXAMINER.—All right.

Mr. WALLACE.—Wait a moment, Judge Eddy, before you testify. The Northern Pacific Railway Company, defendant, desires now to, and does hereby object to the introduction of any testimony in this case, for the reason that if all the allegations of the complaint were proven, the complainant would not be entitled to the relief sought; and further that if the allegations of the complaint were all proven or admitted, the plaintiff would not be entitled to any relief in this action. I want to preserve that and have it appear, if the Master please, that we object to all proof that is offered on this hearing.

Direct Examination by Mr. LOEB.

Q. What is your name?

Mr. WALLACE.—Of course I will have to ask for some sort of ruling or reservation of ruling.

(Testimony of John W. Eddy.)

The EXAMINER.—I am hearing this as an examiner, not as a master, so the ruling will go before the Judge of the court.

Mr. WALLACE.—Very good.

A. John W. Eddy.

Q. Where do you reside, Mr. Eddy?

A. In Helena.

Q. How long have you resided in Helena?

A. Since 1877.

Q. What business have you been following during the time since 1877 until the present time?

A. Well, I have been interested in mining—I was the first auditor of the old Montana company—and I have done some work as an attorney, but principally mining and land office business after that.

Q. Did you know a man by the name of Martin Lemline? A. Yes.

Q. When did you first become acquainted with Martin Lemline?

A. In about the year 1885 or 1886.

Q. Where was it that you made the acquaintance of Mr. Lemline? A. Wolf Creek.

Q. Under what circumstances did you make his acquaintance?

A. I was right of way agent for the Montana Central Railway Company, and I bought some land from him for a right of way and a depot at Wolf Creek, or just below it.

Q. Where is this town of Wolf Creek that you speak of?

(Testimony of John W. Eddy.)

A. I think it is in about fifteen north, four west, to the best of my recollection.

Q. In Lewis and Clark County, Montana?

A. It is in Montana, in this county.

Q. You were purchasing then a right of way for the Montana Central Railroad, over and through the land belonging to Mr. *Lammlein*?

A. Yes, sir, he claimed it as a homestead.

Mr. WALLACE.—We object to the statement "He claimed it as a homestead," as not responsive to the question and irrelevant and immaterial.

Q. Well, what right did you purchase from Mr. Lemline?

Mr. WALLACE.—At this point the defendant, Northern Pacific Railway Company asks the counsel for the complainant whether the purchase in question was evidenced by a written statement.

Mr. LOEB.—I think the witness, Mr. Wallace, is better able to state that than I am.

Mr. WALLACE.—If you don't object, then, I will ask him.

By the WITNESS.—It was a deed and is on file.

Mr. WALLACE.—The defendant Northern Pacific Railway Company objects to this question, for the reason that it appears that the right of way purchased was secured by written instrument, and that instrument is the best and only evidence of the right that was purchased.

Mr. LOEB.—Counsel for complainant replies by saying that a certified copy of the deed from Mr.

(Testimony of John W. Eddy.)

Lemline to the Montana Central Railroad Company will be produced later on in the hearing of this cause.

By the WITNESS.—A part of what he claimed was his homestead, or to be his homestead as soon as surveyed. It was unsurveyed land then.

Mr. WALLACE.—The answer of the witness is objected to as hearsay and not proven to be within any exception making the declaration admissible in evidence, and this answer and any questions and all questions as to the claim of Martin Lemline are further generally objected to for the reason that any testimony as to the qualification of Lemline to enter or occupy land is irrelevant and immaterial in this case; and also because the matter has been concluded by a decision of the land department of the United States, referred to in the pleadings in this case.

Q. Did you investigate, Mr. Eddy, the character of claim or right that Lemline claimed to have to the land of which you were purchasing a right of way over?

A. Well, only through him, and the fact that it was generally admitted that he was a qualified citizen to file on the land.

Mr. WALLACE.—The portion of the answer following the words "Well, only through him" is specially objected to as hearsay, and irrelevant and incompetent.

By the way, Mr. Loeb, have you any objection to allowing or are you willing to allow the general objection reserved to stand to all that line of proof?

Mr. LOEB.—Yes, that is perfectly satisfactory.

(Testimony of John W. Eddy.)

Mr. BULLARD.—That will be in the record then, Mr. Loeb?

Mr. LOEB.—Yes, there is no objection to that. Of course, if it is not competent it is not competent and that's all there is to it.

Q. You say you made some investigations then? Did you recommend the payment of the money to Mr. Lemline?

A. Yes, but I paid it; I paid it myself.

Q. You paid the money yourself?

A. As right of way agent, yes, sir.

Q. You had full authority from the railroad company to purchase rights of way? A. Yes, sir.

Mr. WALLACE.—Especially object to that as immaterial and the authority in question, if material, would, under the statutes of Montana, have to be evidenced by a written instrument.

Q. What condition of affairs did you find there when you started negotiations with Mr. Lemline as to the purchase of a right of way through his land, with reference to his living there or not?

A. He was in possession of the land and had crops growing on it.

Q. And what portion of the land did you purchase for a right of way?

A. I don't know how to describe it except it is the land —

Mr. WALLACE.—Especially object to that in that the portion purchased must be determined by the calls of the deed taken.

(Testimony of John W. Eddy.)

Q. You may go on, Mr. Eddy.

A. It was as the road now runs through the place.

Q. What road is that?

A. The Montana Central Railroad, or a railway company; and the place where the depot now stands. There was extra land taken there for depot purposes.

Q. Did you ever have any conversation with Lemline at or about the time you purchased this right of way for the Montana Central Railroad through his land, with reference to whether or not he was qualified to enter up lands under the homestead laws?

A. He claimed that he was.

Mr. WALLACE.—Wait a moment. The question is: Did you ever have any such talk?

A. Yes, sir.

Q. Well, what statements did he make to you with reference to his being a person qualified to enter lands under the homestead laws of the United States?

Mr. WALLACE.—Specially objected to as hearsay, and not shown by the proofs to be within any exception making declarations of third persons admissible.

A. He said he was a citizen of the United States.

Q. What was said with reference to his intention as to occupancy of the land?

Mr. WALLACE.—Objected to for the reason last given and as leading.

A. He said he was going to file on it as his homestead.

Q. Did he tell you when he expected to file on it as his homestead?

(Testimony of John W. Eddy.)

Mr. WALLACE.—Objected to as hearsay and not shown by the proof to be within any exception making disclosures of third persons admissible, and as leading. A. As soon as it was surveyed.

Q. In your answer you say "As soon as it was surveyed." Do you mean by that, that that was the impression you got, or was what Lemline told you?

A. It was what he told me. If he had not been a citizen I would not have had to pay him for the land.

Q. Now, do you know what the description of the land by government subdivisions or legal subdivisions would be on which Lemline was then located?

A. Well, I think it was the southeast quarter—

Q. (Mr. WALLACE.) The question is, do you know it, Judge?

A. I looked it up, but I don't just this minute recall just what quarter it was. I think it was the southeast quarter of section 35.

Mr. WALLACE.—Let's have an answer to the question, please. There is enough here at issue for you to confine yourself to the question. Do you know?

A. I know it was in section thirty-five of township fifteen north, of range four west, and I think it was in the southeast quarter. I could go onto the land. I think his subdivision as surveyed since contains the same land as where the depot is now.

Q. It is the identical land, then, where the Montana Central Railway depot is at Wolf Creek?

(Testimony of John W. Eddy.)

A. Yes, sir.

Q. In Lewis and Clark County, Montana, that Lemline was located on when you first knew him?

A. Yes, sir, just below the town of Wolf Creek; I think it is just below the village, if you can call it such.

Q. Now, do you know John *Tridrick*?

A. I do.

Q. How long have you known Mr. *Trodick*?

A. Since 1891, I believe.

Q. Do you know where Mr. *Troddick* lives now?

A. Yes, sir; he lives at Wolf Creek.

Q. Do you know the land on which he is living?

A. The same land that was claimed by Mr. Martin Lemline and occupied by Mr. Lemline.

Q. So that so far as the land is concerned, the Lemline land and the *Troddick* land are identically the same land?

A. The same land exactly.

Q. Have you ever been on what is described as the southeast quarter of section thirty-five, township fifteen north of range four west, Helena land district?

A. Yes, sir.

Q. *What* did you first go on that land?

A. I think it was in 1885; it was quite a while before I got the deed. I got the deed in 1886.

Q. How recently have you been on that land?

A. Well, I don't know; it must be five years since I was down at Wolf Creek.

Q. How long?

A. I think it must have been five years since I was down at Wolf Creek.

(Testimony of John W. Eddy.)

Q. Do you know something of the values of lands in that vicinity?

A. Well, I should have an estimate of my own. Of course I never bought or sold any lands excepting the rights of way.

Q. Well, what would you say of the value of the land of that description that I gave you?

Mr. WALLACE.—Object, as the witness has not qualified by his testimony.

Mr. LOEB.—Just a minute, Judge.

Q. Have you seen land bought and sold in that vicinity—heard of it?

A. I bought the land from Mr. Lemline myself and paid him five hundred and fifty dollars.

Q. Did you purchase other lands in that vicinity?

A. No—just a little above and below that place.

Q. Well, do you know something of the values of land of the description I gave you a moment ago, anywhere close?

A. Adjoining the southeast quarter?

Q. Not necessarily adjoining it, Judge, but do you know something of the values of the same class of land as the *Troddick* lands in Lewis and Clark County?

A. Yes, I think so.

Q. And have you seen that class of lands sold and purchased—do you know of that class of land being sold?

A. I bought land of Mr. Kisselpaugh this side of there, and I bought lands below it for rights of way.

Q. And have you known of other real estate transactions—the sale of lands something of the same

(Testimony of John W. Eddy.)

character as that land, whether in the immediate vicinity or not?

A. Not in the immediate vicinity, above and below.

Q. Well, have you known of sales of land of the same class—of agricultural land—as this land I described? A. Yes.

Q. And from that knowledge and your purchases of lands and your visits to the land and knowledge of it, what would you say—about what would you consider the value of these lands?

Mr. WALLACE.—Objected to because the witness has not shown himself qualified to prove the value of the land in controversy at any time material to this inquiry, as—

A. Well, I think that land which was owned by Mr. Lemline is now worth considerably over two thousand dollars.

Q. And when you give us the estimate of the present value of the land, you do that from sales of land that are now taking place and the values of land as they are now generally understood to be worth?

Mr. WALLACE.—Objected to as leading.

A. As they are now held to be worth.

Q. Yes. You are not basing them, Judge Eddy, your estimate as to the values of land, upon your sales and purchases at the time the purchase was made to Mr. Lemline?

Mr. WALLACE.—Objected to as leading.

A. Oh, no.

(Testimony of John W. Eddy.)

Q. But you are basing it, rather, upon present conditions and present market values, are you?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. Did you ever see Mr. Lemline living on the land known as the southeast quarter of section number thirty-five, township number fifteen, north of range four west, Helena land district, Lewis and Clark County, Montana?

A. I did.

Q. What class of improvements did Lemline have on that land when you first saw him there?

A. He had a house in which he lived, and had the ground cultivated to some sort of grain. A part of the grain field was partially in the right of way strip. I think it was wheat. There were other buildings around there, but whether he owned them at the time I do not know.

Q. What have you to say as to whether there was any fencing on the land?

A. There was fencing.

Q. Ditches?

A. Of that I am not sure. Oh, yes; there was at least a spring that he had piped to his house, and I think he carried it still farther on, but that I am not sure about.

Q. And this condition of affairs existed during what year?

A. I paid him for the land in 1886. How long before that I had arranged with him I don't know; some time before.

(Testimony of John W. Eddy.)

Q. '86, then, was the first year that you saw the Lemline place down there?

A. I think it was earlier. I had to make all these arrangements before I got the deed. I think it was '85 that I first saw it; yes, sir.

Q. How long do you know, of your own knowledge, Judge, that he continually resided there after '85?

A. Well, he died on the ground, Mr. Lemline did.

Q. How long do you know he was there afterwards?

A. Until his death. I think it was in 1889, possibly 1890.

Cross-examination by Mr. WALLACE.

Q. 1885 was your first acquaintance with this man, was it, Judge?

A. Yes, sir, that was the first.

Q. And rather as to this ground that I am speaking of—so as to know anything about it?

A. I made the arrangements before I got the deed, and I got the deed July 31st, 1886.

Q. Don't let us have so much rambling, Judge; give me an answer; that is all I want. I don't care anything about arrangements; I didn't ask anything about that.

A. Well, it was about that date.

Q. Were you down there in 1887?

A. I think I was.

Q. To pay attention to this land?

A. Oh, no, not to pay attention to it.

Q. In 1888? A. No.

(Testimony of John W. Eddy.)

Q. In 1889?

A. No, not to pay attention to the land.

Q. Nor any year since, have you, to pay attention to the land?

A. Not especially to pay attention to that; no.

Q. You were then engaged in traveling over the county along the line pursued by the Montana Central Railway, purchasing rights of way?

A. Yes, sir.

Q. And you didn't stop any longer than necessary in any single place—any longer than to get your right of way?

A. Sometimes it necessitated a good many stops.

Q. Well, you didn't ordinarily stop any longer than that, did you?

A. Not usually; I intended not to.

Q. Well, when you came to the Lemline place first on this right of way errand, and when you first saw the ground, you state that he was in the occupancy of a part of section thirty-five, you think the southeast quarter?

A. Yes, sir.

Q. It was unsurveyed?

A. It was unsurveyed then.

Q. Did you ever participate in any survey afterward?

A. No, sir.

Q. Did you ever see the lines marked on the ground afterward?

A. No, sir.

Q. Do you know of your own knowledge where the southernmost line of section thirty-five falls?

A. No, sir.

(Testimony of John W. Eddy.)

Q. I will ask you if you ever saw any marks on the ground, or any subdivisions of the section?

A. No, sir. The survey was not made until 1890.

Q. Well, have you since the survey, seen any markings on the ground? A. No, sir.

Q. And since the survey has been made, do you know just where the south line of section thirty-five runs? A. No, sir.

Q. Would you be able to go down to-day onto that ground, and take us along the south line of section thirty-five?

A. Well, I might be able to find the corner; that is the only way I could do it.

Q. You could only do it by looking up the corner?

A. Yes, sir.

Q. You couldn't do it from your previous knowledge of that survey of where the corners were?

A. No, sir.

Q. You assumed, of course, in what you told us, that the track and depot of the Montana Central Railway was in section thirty-five?

A. Yes, sir. It is the old land that since proved to be that.

Q. If you are mistaken in that, of course you are mistaken in the assertion that Lemline's occupancy is on section thirty-five? A. Yes, sir.

Q. Now, what evidences were there of Lemline's occupancy at the time you went down there? Was the land fenced?

A. Yes, that is, portions of it. I don't know that it was all fenced. A portion of it was fenced.

(Testimony of John W. Eddy.)

Q. Now, tell us where that fence ran with reference to the present line of railway?

A. The track runs on the south side of the fence that ran along the road below Wolf Creek for quite a distance.

Q. Well, now, did the fence extend to the south of where your line ran, where your old track line was to go? A. No.

Q. It was entirely north?

A. It was on the northern side, I think, all the way.

Q. Sure of that?

A. If I have the right direction.

Q. Well, now, do you call north down there to the right hand of the track as you are going to Great Falls, or to the left? A. The left.

Q. Well, how much fence in distance did you see there?

A. Well, I don't know just how far—quite a long distance below where we took in the depot grounds.

Q. What you call below is toward Great Falls?

A. Down the creek, I mean.

Q. Down the creek?

A. There was a fence along the left-hand side of the line that we took, some little distance away from the road, and that fence to me seemed to run northeast a ways, or northeast and southwest.

Q. Now, there is a canyon there at that point?

A. No, sir.

Q. No? Perfectly flat prairie land, is it?

A. Well, it is pretty flat, level; yes, sir.

(Testimony of John W. Eddy.)

Q. No canyon around there anywhere?

A. Well, there is a canyon a ways this side, and perhaps you would call it a canyon down below, but it is level land where we took the depot grounds.

Q. Any hills in the vicinity?

A. Well, some little distance away, but not immediately there.

Q. Well, how far away from the track to the south?

Mr. LOEB.—Object as being immaterial and irrelevant and incompetent.

A. I should think it would be three-eighths or half a mile, or over that; that is my memory of it now.

Q. Now, would you tell us that there is not a sharp and high mountain that starts all along the southern side of that track at points opposite what is now known as Wolf Creek, and not over two hundred yards from the track?

Mr. LOEB.—Object to the same as improper cross-examination and irrelevant and immaterial.

A. Well, I don't remember any such hill as that. I paid no special attention to the hills when I got the right of way. I know what we got was level.

Q. Isn't it a fact, Judge, that that whole region about Wolf Creek is known as the Prickly Pear Canyon, and that the little Prickly Pear Creek flows down through it?

A. The little Prickly Pear Creek flows down through it.

Q. Isn't it known as the Prickly Pear Canyon?

(Testimony of John W. Eddy.)

A. I don't know it as such. The one I know is away this side of that.

Q. And isn't that part of the country reached by the great flood of 1892 in the Prickly Pear Canyon that tore out the ground around there?

A. Yes.

Mr. LOEB.—Object as improper cross-examination, and irrelevant and incompetent.

Q. What is the width of the bottom land along the Prickly Pear Creek at points opposite and for a quarter of a mile above and below the Wolf Creek depot?

Mr. LOEB.—Object to the same as not proper cross examination, and irrelevant and immaterial.

A. There is quite a flat.

Q. No, the width, Judge.

A. Oh, I should think it is about three-eighths of a mile, or half a mile; that is my impression.

Q. You wouldn't want to make that statement positively, on oath?

A. No, I couldn't make it positively, because I never measured it.

Q. What bounds that flat on the south side?

Mr. LOEB.—Object as improper cross-examination and irrelevant and immaterial.

A. There are hills.

Q. Is there in that flat any old road that was traveled when you came to the country, or when you first saw it?

A. Yes, sir.

Q. Known as the old Benton stage road, isn't it?

(Testimony of John W. Eddy.)

A. Yes, sir.

Q. Did you see any fences on the north or left side of that road? A. Going down?

Q. Yes, left side going down.

A. Don't remember any.

Q. Did you see any cultivation on the left side of that road?

A. On the left side, I don't remember any. The cultivation was down in the flat.

Q. Well, the road is in the flat, isn't it?

A. Yes, but the ground that was cultivated—

Q. To the south of the road?

A. Where we took the land for depot purposes, or in that vicinity, there is quite a valley there.

Q. Was this house or dwelling that you saw, north or south of the road, the old Benton stage road? A. North, if I remember right.

Q. That would be to the left going down to Great Falls?

A. Yes, to the left going down to Great Falls.

Q. How far from the road?

A. I don't know just how far; not very far.

Q. That is indefinite. Can you do better, or have you no memory about it at all?

A. Well, my memory about it is that it was on the left-hand side and that it was up higher than the road.

Q. Have you any memory of the distance from the road?

A. But the distance I don't remember; it was not very far.

(Testimony of John W. Eddy.)

Q. What was the area of this grain field?

A. That I don't remember; I never measured it.

Q. As much as two acres?

A. I should think there was more than that.

Q. As much as four? A. I should think so.

Q. As much as six?

A. I can't tell you how many acres, but it is quite a little grain field—quite a grain field.

Q. Well, are you sure there was as much as six acres?

A. What you would call the grain field?

Q. Are you sure there was as much as you would call six acres?

A. No, I wouldn't be sure, because I have no means of knowing.

Q. What is the number of the section that lies south of thirty-five at that point?

Mr. LOEB.—Object as not proper cross-examination.

A. I have never been on that section to know it, but I can tell you by counting up what section it would be according to the survey.

Q. Do you know now? A. No.

Q. All right.

A. I could tell you what section ought to be there, but that is all I know about it.

Q. Any one of us who knew anything about government surveys could tell the same thing?

A. Yes. I didn't suppose you were asking for information really, anyway.

(Testimony of John W. Eddy.)

Q. Did you see any evidence of occupancy on any of the bottom lands or creek bottom to the south or right-hand side of your right of way, or the track line as it afterwards was built?

A. That I do not know.

Q. Do not know?

A. We took a portion of the grain field, but whether it went south or not I do not know.

Q. That is, it may or may not have gone south of the right of way; you don't remember?

A. We went through a portion at least of a grain field, but how much was south or how much north I don't know.

Q. What was the width of the right of way you acquired? Do you remember that?

A. I don't know; I can look it up and furnish you the information.

Q. We can look it up; we are just testing your memory, that is all.

A. They varied it in different places.

Q. Now, where did you last buy any land? You mean it varied in different places, or at this place?

A. I say that they varied it in different localities.

Q. Oh, I didn't care anything about that. I asked you the width of the right of way across this land.

A. I don't know how much we took there; we took more for the depot than the right of way.

Q. What you got at that point you got entirely from Mr. Lemline, including the depot land?

A. Yes, sir.

(Testimony of John W. Eddy.)

Q. Mr. Lemline, as you say, was claiming all the land you got from him? A. Yes, sir.

Q. When did you last buy any land at the station of Wolf Creek, or in that vicinity?

A. That I couldn't tell you unless I looked up my record.

Q. Well, have you bought any since 1886?

A. Well, about that date I suppose the others were purchased—I suppose about the same date.

Q. Did you ever buy any land down there except in this right of way business? A. No, sir.

Q. In that, you not only paid the value of the land taken, but the indirect damage done to other lands not taken. That is true, isn't it?

A. That is true.

Q. When you spoke of the land then owned by Mr. Lemline, what area of land did you have in mind—of the cultivated land?

A. A quarter section.

Q. A quarter section? A. Yes.

Q. One hundred and sixty acres? A. Yes.

Q. And you included in that idea, of course, whatever land there was in the immediate bottom of Prickly Pear Creek at that point?

A. Yes, sir.

Q. Now, when were you down there to examine Troddick's occupancy?

A. I don't know that I have been there at all to examine his entry. He came to me about it.

Q. What's that?

(Testimony of John W. Eddy.)

A. He came to me about it, and wanted to have me see if he could file on the southeast quarter of section thirty-five.

Q. I am not asking you about what he wanted, and I object to that answer as to what *Troddick* wanted when he came to Judge Eddy, the witness, as not responsive to the question.

Mr. LOEB.—We object to the motion of counsel to strike out the answer as being a statement elicited by counsel upon cross-examination, and should stand in the record as against him.

Q. What was it on the ground that enabled you to know what the boundaries of *Troddick's* occupancy were? A. Mr. *Troddick*—

Q. Now, on the ground, Judge, what was there on the ground—what physical thing was there on the ground?

Mr. LOEB.—Just a moment, please. Let the witness answer the question in his own way.

A. I didn't see the ground when he came to me to file on it. He simply described it to me.

Q. Then whatever knowledge you gained as to the actual occupancy of *Troddick* at any time, was from what he told you? A. Yes, sir.

Mr. WALLACE.—Now, I move to strike out testimony in direct examination of the witness that *Troddick* was occupying the same land as Lemline had occupied, and all testimony as to the *Troddick* occupancy, on the ground that it is pure hearsay.

Mr. LOEB.—Counsel for the complainant object to the motion.

(Testimony of John W. Eddy.)

By the WITNESS.—I suppose I ought to correct that a little bit. It just occurs to me that Mr. Bickell, who was a surveyor, came with Mr. Troddick, and a Mr. Forman, to my office, and Mr. Troddick got Mr. Bickell to describe the land to me as a surveyor, and wanted to know if I could file on the land for him, or get a filing placed on the land for him. I examined the records at the land office, and found that although a survey had been made, the plat had not been filed. That was in 1891.

Mr. WALLACE.—Moved to strike out the answer as wholly hearsay.

Mr. LOEB.—We object to the motion to strike out for the reason that it will appear upon redirect examination that the witness does know that the Lemline land and the Troddick land are identically the same land.

Mr. WALLACE.—You should have examined him on direct in relation to this matter.

Mr. LOEB.—I don't think you would have a right to interpose your motion except all the testimony was in.

Q. Now, Judge, you say that you saw Lemline living on the southeast quarter of section thirty-five?

A. Yes, sir, on what proved to be. It was unsurveyed at the time he lived there.

Q. That is, you saw the house he was living in?

A. Yes, sir.

Q. You assumed that that house was in the southeast quarter of section thirty-five—do you know as it was afterwards surveyed?

(Testimony of John W. Eddy.)

A. At that time I did not know what legal subdivision it was on.

Q. Judge, in answering the question that you saw Lemline living on the southeast quarter of section thirty-five, you assumed—

A. I said it was on what proved to be the southeast quarter of section thirty-five, after survey.

Q. That is what you want to say now. Well, Judge, of your own knowledge how did you know that Lemline was on what proved to be the southeast quarter of thirty-five after survey?

A. I only know from the fact that the surveyor told me so; that is all. I didn't survey it.

Mr. WALLACE.—Moved to strike out all the testimony of the witness concerning Lemline's occupancy or improvements being on the southeast quarter of section thirty-five, or on section thirty-five, as hearsay.

Redirect Examination by Mr. LOEB.

Q. You do know, Judge, that the land which *Troddick* is now occupying is identical with what Lemline was occupying?

Mr. WALLACE.—Object to the question as leading. A. Yes, sir.

Q. How do you know that?

A. The surveyor came to my office with Mr. *Troddick*, and a man by the name of Forman, who said they knew the survey had been made, and Mr. *Troddick* wanted to file upon that land.

Mr. WALLACE.—Move to strike out the answer as hearsay.

(Testimony of John W. Eddy.)

Q. Lemline was living upon the—

Mr. WALLACE.—Excuse me just a moment. I move to strike out all the answer after the enumeration of the parties who came to his office, and so much of it as involves the statements made by them, or any of them, as hearsay.

Q. Lemline was living on the identical land that the depot at Wolf Creek is now located on, was he not?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. And if the depot at Wolf Creek—that is, the Montana Central Railway depot at Wolf Creek, Lewis and Clark County, Montana, is located on the southeast quarter of section thirty-five, township number fifteen north of range four west, Helena land district, the land which Lemline was occupying was the southeast quarter of section number thirty-five, township fifteen north of range four west, Helena land district?

Mr. WALLACE.—Object as leading.

A. Yes, sir.

Q. You saw Martin Lemline actually living upon the identical land that the depot at Wolf Creek, Lewis and Clark County, is situated on—that is, on the same quarter section?

A. Yes, sir. Well, I didn't know what quarter section it was on at that time, but I know he claimed that land I bought of him as a part of his homestead and he was living in a house that was on that land.

(Testimony of John W. Eddy.)

Mr. WALLACE.—Moved to strike out so much of the answer as has reference to the claim of Lemline, as not responsive to the question, and hearsay, and not within any rule admitting declarations of third persons.

Q. Do you know that Lemline claimed one hundred and sixty acres of land as a homestead, embracing the identical land on which the depot at Wolf Creek, Lewis and Clark County, is situated?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. So that if a survey develops the fact that the depot at Wolf Creek, Lewis and Clark County, is upon the southeast quarter of section thirty-five, township fifteen north of range four west, Helena land district, that was the identical land upon which Lemline was located, and that he claimed under the homestead law?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. Now, you stated you purchased this land from Lemline in 1886. That is not the only knowledge that you have as to values of land in that vicinity, is it?

A. Oh, no, sir.

Q. Have you not a general knowledge, Judge Eddy, as to values of land in that vicinity now?

Mr. WALLACE.—Objected to as leading.

A. Well, I should think so.

Q. You have seen lands bought and sold recently in Lewis and Clark County, have you?

(Testimony of John W. Eddy.)

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. Do you base your estimate as to the value of the Lemline tract and the *Troddick* tract from sales which you have seen recently negotiated and made, and on present values rather than upon the value in 1886?

A. More upon my inquiry as to what the prices of property were held at—not sales. I asked to find what the values were, because if this was an insignificant piece of property there could be no dispute about it; the suit could not be maintained in this court.

Q. But you investigated the value of property?

A. I made a good many inquiries to get—

Q. I don't care about the inquiries that you made. But you base this judgment of yours that it was worth over two thousand dollars, on the result of your inquiries?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. Were these inquiries made recently?

Mr. WALLACE.—Objected to as leading.

A. Some of them within a few months of the present date.

Q. In 1886 there was cultivation upon the tract of land that the depot at Wolf Creek was situated upon, wasn't there?

Mr. WALLACE.—Objected to as leading, and repetition.

A. There was some grain on it.

Q. Who made the cultivation, if you know?

(Testimony of John W. Eddy.)

A. Mr. Lemline.

Recross-examination by Mr. WALLACE.

Q. You have been making recent inquiries as to the value of the land, Judge? A. Yes, sir.

Q. Well, how did you come to be interested in the matter? Are you an attorney of the complainant?

A. I was his attorney in the land office.

Q. Are you yet in any manner interested in the matter as attorney or otherwise?

A. Only in the land office.

Q. You are the land office attorney as to the matter of procuring title to this land?

A. Yes, sir, endeavoring to do it.

Q. You are still endeavoring to do it?

A. Well, I would like to very much. I think he is entitled to it.

Q. You would like to?

A. Yes, sir, for Mr. *Troddick*.

Q. Now, did Lemline indicate to you, when you were down there—you saw his house—any boundary marks, or show you any boundary marks as to his occupancy?

Mr. LOEB.—Object as not proper recross-examination, and immaterial and irrelevant.

Mr. WALLACE.—You may answer, Judge.

A. He didn't show me any boundary marks. He only pointed out the land as his own that he claimed.

Q. Well, then you don't want us to understand that he took you to any marks, or pointed out to you any monuments from which you are now able to say that he then claimed precisely what has since proven

(Testimony of John W. Eddy.)

to be by survey, the southeast quarter of section thirty-five?

A. He simply showed me the land and told me that was the land he claimed, one hundred and sixty acres.

Q. Well, answer my question.

A. Isn't that an answer to it?

Q. Not at all.

A. Read the question and I will answer it again.

Q. Well, then, you don't want us to understand that he took you to any marks, or pointed out to you any monuments from which you are now able to say that he then claimed precisely what has since proven to be by survey the southeast quarter of section thirty-five?

A. He didn't point out any monuments.

Q. Or boundaries? A. No.

Q. He didn't point out any to you?

A. No, just pointed out the land to me.

Q. How did he indicate the land—as the devil showed the Savior the earth, by a wave of the hand?

A. That might have been it.

Q. Well, how did he indicate the land to you?

A. Well, we went over the land together.

Q. And did he tell you how far south of where the depot now is that he claimed his boundaries to run, and if so, how far did he say?

A. Well, he claimed, I think, there was an occupancy between him—someone that had a piece of ground below.

Q. What do you mean by below—down the creek?

A. Down the creek.

(Testimony of John W. Eddy.)

Q. You call that south?

A. It is northeast, isn't it?

Q. Listen to me again.

A. That is, I think, east a little, if I remember correctly.

Q. Did he tell you how far south of where the depot now is that he claimed the ground?

A. Well, he—

Q. Did he tell you, Judge?

A. Well, we had a plat as we described the land, and on that plat was his ground marked down, and he said that was correct.

Q. Now, let's get away from the plat.

A. Yes.

Q. Did he, on the ground, take you any point south of where the depot now is and say, "I claim this land to that point."

A. No, not that I know about.

Q. Did he take you to any point north of where the depot now is and say "I claim this land to that point"?

A. No, he didn't take me to any point unless it was the boundary fence.

Q. And that is the fence that you have spoken of that runs just south of the old Benton stage road?

A. No, a cross-fence, I think, between him and Ackley. I think someone owned the land adjoining his on the north.

Q. Down the creek you are speaking about?

A. Yes, sir.

(Testimony of John W. Eddy.)

Q. But I am speaking of the lateral distances, across the creek. A. No.

Q. Didn't show you anything about the lateral distances? A. No.

Q. And the only idea you got from him was of the distance down the creek to which he claimed the land, and the distance up the creek?

A. Yes, and the flat in the valley; he claimed to own that.

Q. And what distance up the creek did he claim to own from where the depot now is?

A. That I can't tell. Some distance up, but I can't tell you how far.

Q. And below, down to where you think is Ackley's?

Mr. LOEB.—Object as not proper recross-examination. A. There was some fences.

Q. Some fences?

A. I think there was some fences as far down as Ackley's but I couldn't tell you without an examination.

Q. And was it from this fence that you recall he indicated as the boundary on the *down the creek* side, but you can't recall any distance that he gave you, either to each side, across the creek or up the creek?

Mr. LOEB.—Object as not proper recross-examination.

A. I can't give you any description of the areas, because I don't think there was any monuments there that I have ever seen.

(Testimony of John W. Eddy.)

Redirect Examination by Mr. LOEB.

Q. You spoke of a plat that you said you had in response to a question propounded to you by Mr. Wallace, which you said Lemline said was correct?

A. Yes, sir.

Q. Have you got that plat?

A. I think I have in my office; yes, sir.

Q. Can you produce it here?

A. I think I can.

Mr. LOEB.—We will ask permission to introduce that plat later.

Q. Judge Eddy, you will not let the fact that you have been an attorney for Mr. *Troddick* in the land office cause you to testify to anything in this case except what you knew and what was the truth, would you?

A. No, sir.

Mr. WALLACE.—His testimony shows that. That is all.

JNO. W. EDDY.

Subscribed and sworn to before me this 29th day of December, 1904.

HENRY N. BLAKE,
Examiner.

JOHN H. SHOBER, a witness called on behalf of complainant, sworn, and testified as follows:

Direct Examination by Mr. LOEB.

Q. Mr. Shober, what is your name?

A. John H. Shober.

Q. Where do you reside, Mr. Shober?

(Testimony of John H. Shober.)

A. Particularly in Helena City, Montana; have been on a ranch.

Q. What profession or calling do you follow?

A. That of an attorney at law.

Q. How long, Mr. Shober, have you been practicing law? A. A little over fifty years.

Q. What period of time have you been practicing in Lewis and Clark County, Montana?

A. About forty years.

Q. When did you first come to Lewis and Clark County, Montana? A. 1864.

Q. You know a person by the name of Martin *Lammline*? A. I do.

Q. When did you first make the acquaintance of *Lammline*?

A. In 1864. We crossed the plains together—that is, in the same outfit.

Q. You came to the country, then, with *Laamline*?

A. Yes, sir.

Q. You know whether or not *Lammline* was a citizen of the United States?

A. All I know is what he claimed to be; he claimed to be a citizen and a voter, and I know that he voted; he exercised that prerogative.

Mr. WALLACE.—Moved to strike out the answer as not responsive to the question, and as hearsay, and not within any rule admitting hearsay evidence, save the statement that he always voted.

By the WITNESS.—I know he voted in '65 and '67; I don't know whether he always voted.

(Testimony of John H. Shober.)

Q. You know, then, Mr. Shober, of your own knowledge, that he voted in '65 and '67?

A. Yes, sir.

Q. What serves to make you feel sure that he voted in '67?

A. Well, I was candidate for district attorney these two years, and I visited Mr. *Laamline* at Silver City, and saw him among other persons that lived in that country, and I know he voted.

Q. Was he a man who took an active part in politics?

A. Pretty active for his friends.

Q. Took an interest in elections, did he?

A. Yes, sir.

Q. What have you to say as to his statement to you as to his citizenship. You say he claimed to be a citizen?

Mr. WALLACE.—Object as incompetent and hearsay.

A. All you can say as to that is that citizens of the United States are those who have indicated their intention to become, and in going around and making a canvass we found out about that.

Q. You ascertained from Mr. *Lammline* when you were making your canvass as a candidate for district attorney, did you?

A. I ascertained that he claimed to be.

Mr. WALLACE.—Object as immaterial.

Q. You say you knew him, then, in 1864?

A. Yes, we became acquainted.

(Testimony of John H. Shober.)

Q. And where did he go to when he came in Montana?

A. He settled in Silver City, what was then Silver City, not what is now.

Q. How long did he live in Silver City?

A. That I can't tell you positively. The first time that I knew he had moved from there was in '77. He then had a cabin down where the town of Wolf Creek now is.

Q. That was in what year?

A. I think in '77.

Q. Did you see Martin Lammlein where the town of Wolf Creek is now in 1877?

A. I think I did in '77 or '78; probably '79 or '80 I saw him down there.

Q. Did you ever stop there, Mr. Shober?

A. Well, yes; I have stopped at the old gentleman's house.

Q. What have you to say during the time you stopped there, whether he was improving the land on which he was located?

A. He had some land in cultivation there; he had a house on it, and he had some ground cultivated; I don't know the amount.

Q. Did he have it fenced?

A. He had it fenced some; how extensively I don't know.

Q. Do you know, Mr. Shober, where Mr. Trodrick lives?

A. Yes, I think I do.

(Testimony of John H. Shober.)

Q. What have you to say as to whether the *Lammlein* land and the *Trodrick* land were substantially the same land?

A. Not knowing the boundaries, I should think they lived on what, at that time, was termed the *Lammlein* claim.

Q. That *Trodrick* is now living on what was then termed the *Lammlein* claim? A. Yes, sir.

Q. You are not a surveyor, of course, and never made any survey of it?

A. No; I know nothing of the numbers of the subdivisions or sections.

Cross-examination by Mr. WALLACE.

Q. You came across the plains in '64 with *Lammlein*, you say? A. Yes, sir.

Q. And became acquainted with him on that trip?

A. Became slightly acquainted, yes, sir.

Q. That was the Sully expedition?

A. Yes, sir.

Q. About how many people?

A. About two hundred and fifty of us emigrants.

Q. About how many soldiers?

A. About thirty-five hundred mounted infantry and cavalry.

Q. Do you wish us to understand, Mr. Shober, that you recall now any particular occasion when you were present and saw Mr. *Lammlein* cast his ballot at a general election?

A. No, I don't recall any time that I personally saw him cast his ballot, but I have seen his name on the poll-book and return.

(Testimony of John H. Shober.)

Mr. WALLACE.—Move to strike out the statement that he has seen his name on the poll-books and return as hearsay and not responsive to the question, and secondary evidence.

Mr. LOEB.—Object to the motion to strike out on the ground that the statement was elicited by counsel on cross-examination to which he can make no complaint.

Q. Now, Mr. Shober, you know nothing about where the survey subdivisions fall down at Wolf Creek?

A. No, sir.

Q. And a fair summary of your statement is, isn't it, that the house that *Trodrick* now lives in you believe to be standing on what was land that *Lammlein* claimed as it was spoken of in the country?

A. That is what I wish you to understand.

Q. And beyond that you do not care to go?

A. No.

Q. You don't care to state anything about the identity of outer boundaries of the two claims?

A. No, sir. Not knowing anything about it, or inquiring particularly about it, I wouldn't want to state, and I paid no particular attention to the land.

Redirect Examination by Mr. LOEB.

Q. You do know, in a general way, where the *Trodrick* land is?

A. In general I know where his house is; I don't know anything about the boundary.

Q. You know that *Trodrick* was located on the *Lammlein* claim?

(Testimony of John H. Shober.)

Mr. WALLACE.—Object as not redirect examination, and leading.

Q. That is, what was generally understood to be the *Trodick* claim and what was generally understood to be the *Lammlein* claim are practically and substantially the same claim?

Mr. WALLACE.—Object as hearsay and leading.

A. That is my understanding. Of course I knew nothing of the boundaries, as I have stated before.

Q. But you were actually on the land in 1877?

A. Oh, I was over it a number of times; been down there frequently fishing, before and after.

Mr. BULLARD.—If the Master please, I must ask to be excused for a little while. You need not suspend at all, or interfere with the examination. I would like to consent to that, and I would like to know what time you will reconvene in the afternoon.

The EXAMINER.—Two o'clock.

Mr. LOEB.—If Mr. Wallace does not object I would like to discontinue until two now.

Mr. WALLACE.—In that event I should like to have it go over until three o'clock or half-past three.

The EXAMINER.—Let the record show that by agreement the hearing was discontinued until three o'clock.

JOHN H. SHOBER.

Subscribed and sworn to before me this 19th day of March, 1905.

HENRY N. BLAKE,
Examiner.

WILLIAM BROWN, a witness called on behalf of complainant, being sworn, testified as follows:

Direct Examination by Mr. LOEB.

Q. Mr. Brown, what is your name?

A. William Brown.

Q. Where do you live, Mr. Brown?

A. Silver.

Q. How long have you lived at Silver?

A. Since 1864.

Q. What business are you in there?

A. Farming.

Q. Did you know Martin *Lammlein*?

A. Yes, sir.

Q. When did you first get acquainted with him?

A. In the fall of '64.

Q. Where was he in '64 in Montana when you first knew him?

A. In Silver.

Q. And then where did he go from Silver—when did he leave Silver, what year?

A. In '64 he went down into Silver City.

Q. When did he leave Silver City?

A. I think he left there in 1871.

Q. Where did he go to—do you know?

A. He went to the old country; then he came back and then he moved down to Wolf Creek.

Q. Do you know whether *Lammlein* was a citizen of the United States?

A. I think he was; yes, sir.

Q. Well, do you know whether he was yourself?

A. Yes, I know he was.

(Testimony of William Brown.)

Mr. WALLACE.—The defendant objects to any testimony from the witness as to the citizenship or as to the qualifications to enter land as to Martin *Lammlein*, for the reason, first, that the patent is conclusive evidence in this proceeding upon that issue, and, second, that the adjudication of the land office is final in that regard, and, third, that under the allegations of the bill of complaint no relief of the character sought, or of any kind, can be awarded the complainant in this proceed. And I would like to have that objection stand, to save time, to all testimony from the witness relating to the subject of the qualification of Martin *Lammlein*.

Mr. LOEB.—We have no objection to that.

By the WITNESS.—I tell you now how it is; I entered a piece of land in '72—

Mr. LOEB.—Just a moment, Mr. Brown.

Q. Do you know whether he was a citizen of the United States?

A. Yes, sir, I think he was; I am positive he was.

Q. Did you ever see him vote? A. Yes, sir.

Q. How often have you been judge of the election at Silver?

A. Well, he was there for about four years.

Q. How often did you see him vote at Silver City yourself? A. Either two or three times.

Q. And you were judge of the election when he voted, were you?

A. Yes, I was judge of the election.

Q. Now, did you ever go down to *Lammlein's* place at Wolf Creek? A. Yes, sir.

(Testimony of William Brown.)

Q. How early did you go down there?

A. Oh, I was there in '77, I was there.

Q. In 1877? A. Yes.

Q. Was *Lammlein* there in '77?

A. Yes, sir.

Q. What sort of an establishment did he have there then, what kind of a place was it?

A. He had a farm there.

Q. And did he have any fencing or houses, or anything of that kind? A. Yes, sir.

Q. Was he improving it? A. What?

Q. Was he improving it? A. I don't know.

Q. I say was the place improved some?

A. Yes, he was improving there.

Q. What was he doing there?

A. He had potatoes there, and a garden there, and oats growing there.

Q. Oats?

A. Yes. He got quite a little piece fenced in there before the railroad came through at all.

Q. Do you know where *Trodrick* lives now?

A. Yes, I know.

Q. What have you to say as to the land that *Lammlein* had fenced, and the *Trodrick* land being the same land? A. Yes, sir.

Q. It is the same land? A. Yes, sir.

Cross-examination by Mr. WALLACE.

Q. What do you mean by the old country, when you said that *Lammlein* went back to the old country?

A. Well, *Lammlein* went back to Germany.

Q. His fatherland? A. What?

(Testimony of William Brown.)

Q. His fatherland? A. Yes, sir.

Q. His native country?

A. His native country; yes.

Q. You think that he went back about '71?

A. I think it was in '71 he went back; yes.

Q. And returned to the United States?

A. He came back to the United States. He wasn't gone more than probably about a year.

Q. About a year? A. Yes.

Q. When did the railroad go through Wolf Creek, do you know?

A. No, I couldn't tell you the year.

Q. How much fencing did *Lammlein* have down there when you were there?

A. I think it must be between fifty and sixty acres of land. There was the whole place where the railroad is now and the depot is outside; it was all fenced.

Q. That is just a guess of yours?

A. Yes, sir, that is a guess.

Q. You wouldn't be accurate about that, Mr. Brown?

A. I suppose according to looks, you know, it would be forty or fifty acres.

Q. Would you be surprised if it turned out there was only eight acres? A. I couldn't tell you.

Q. It may be you couldn't say?

A. No, sir, I couldn't dispute it.

Q. You were just giving your memory?

A. That is all; just estimating.

Q. You wouldn't want to say under oath that there was more than eight acres under fence?

(Testimony of William Brown.)

A. No.

Q. You know where the old Benton stage road was?

A. Yes, sir.

Q. Was this fence all on the flat side—the railroad track side of that road—or the other side of the road?

A. On the railroad side.

Q. All on the railroad side?

A. Yes, sir.

Q. Was this house that you saw on the railroad side of that road or the other side?

A. It was on the other side again.

Q. On the other side?

A. Yes, sir.

Q. The house was a cabin, I suppose?

A. Yes, there was a good-sized house there. I stopped there.

Q. Made out of logs?

A. Yes, out of logs.

Q. But the house itself was not in the fenced field?

A. Not in that field. He had a fence there too, but on the other side of the road there he didn't live on that at all, but of course he lived on the other side of the road, altogether on the west side of the road.

Q. On the west side of the road?

A. Yes, sir.

Q. That would be the side away from the creek?

A. Yes, sir.

Q. Well, there was a fence around the house, then?

A. Yes, sir.

Q. How much land in the fence around the house?

A. I suppose probably forty acres.

Q. Do you estimate that the same as you did the land on the railroad track side, the creek side?

(Testimony of William Brown.)

A. Yes, sir. I haven't got no survey for it, but just estimation.

Q. Well, I understood you to say a moment ago, Mr. Brown, that all the fence that you saw there was on the side of the old Benton road, and was toward the creek.

A. Only a part of the fence, you know, there on the west side, and the other on the east side.

Q. The road was in a lane?

A. The road goes right between two fences.

Q. A lane? A. Yes, sir.

Q. What kind of a fence was this?

A. It was a log fence.

Q. And the fence that you say you saw there was a log fence?

A. Yes, sir. And the other was a kind of a picket fence.

Q. That is his house fence?

A. Yes, that was a picket.

Q. Well, now, was this garden of oats and potatoes that you saw there, partly on one side of the road and partly on the other? A. Yes, sir.

Q. Sure of that?

A. Yes, I am sure of that.

Q. Sure you saw some garden on the side from the road over toward the creek? A. Yes, sir.

Q. And you are sure it was *Laamlein's* garden?

A. Yes, sir.

Q. And didn't belong to Carter or Kistlepaugh?

A. No, sir, it didn't.

(Testimony of William Brown.)

Q. When was this that you say that you were down there?

A. I guess it must have been in '77 or '78, something like that; I am not sure of the date.

Q. Well, now, when were you down there after *Trodrick* came on the land?

A. Well, I haven't been there much since, but I know I have been there since Mr. *Trodrick* come there, but I have never had no acquaintance with them. I know he lived there, but never had no acquaintance with them whatsoever.

Q. Do you know where he had his land fenced?

A. I don't know anything about that, but he lived in the same house that *Lammlein* lived in.

Q. You know that he lived in the same house that *Lammlein* lived in?

A. Yes, sir.

Q. But you don't want to be understood as saying that he had the same ground fenced or enclosed that *Lammlein* had, but you don't know anything about *Trodrick's* fences?

A. Yes, of course he had the same land that *Lammlein* did.

Q. He had it because his house was on the same land?

A. Yes.

Q. But you don't want to be understood as saying that *Trodrick's* fences were on the same land that the old *Lammlein* fences were?

A. I suppose they was.

Q. You suppose?

A. Yes.

Q. But you didn't see any fences of *Trodrick's*?

(Testimony of William Brown.)

A. Yes.

Q. Did you go around *Trodrick's* fences?

A. I was on the main road and saw the fences alongside of me all the time.

Q. Did you find these in there, then, the last time you went down there?

A. No, they had washed out near the railroad depot there. It was washed out over there.

Q. Was that the same year as the big flood?

A. It was the year after the big flood.

Q. That was the last time you went down there?

A. I have been there since several times.

Q. What was the last time you were down there?

A. The last time I was down there there was no cultivation at all on the east side of the road at all.

Q. That is the side away from the creek?

A. That is close to the creek.

Q. You meant between the road and the railroad?

A. Between the road and the railroad, yes.

Q. Well now, what is the last time you were down there, what year?

A. I was there in '91; I was there when the old man died.

Q. Was that the last time you were there?

A. No.

Q. Tell us the last time, Mr. Brown?

A. The last time I couldn't hardly tell you; it must be in '94.

Q. Was the road in a lane then?

A. The road was the same as it always was.

(Testimony of William Brown.)

Q. But there was no fence on both sides in '94?

A. There was no fence on the east side of the road at all. There was a few logs laying there but there was no fence; but on the west side of the road there was a fence.

Q. Do you know whether that fence, then, was a complete enclosure?

A. It was then in the first place.

Q. Not in the first place but in '94?

A. Yes, there was an enclosure there.

Q. Did you see the whole of the fence in '94?

A. Yes.

Q. All four sides of it?

A. Yes, I had some cattle in there myself.

Q. Then you can tell us how far back up Wolf Creek that fence went?

A. That fence didn't go up to Wolf Creek.

Q. No?

A. Probably half a mile from Carterville we will call it.

Q. How far, say, from Prickly Pear Creek did that fence go?

A. Not over two or three hundred yards.

Q. Did it go up on the hill? A. Yes, sir.

Q. To the top of the hill?

A. I couldn't tell whether it went to the top of the hill, but there is a sag there and it is all fenced in I know, because I had my cattle in there.

Q. Did you go to the far side of the fence?

A. No, I did not.

(Testimony of William Brown.)

Q. What makes you think it went back two or three hundred yards?

A. Well, I had my cattle in there, and when I herded my cattle; of course I didn't go back any further.

Q. You went back a couple of hundred yards?

A. Yes, sir.

Q. The cattle were in sight? A. Yes, sir.

Q. They didn't go back on the hill?

A. No, the cattle was right there.

Q. Now, in the early times, when you were down there, had you ever been around the fence that you say you saw of *Lammlein's*?

A. Well, in '77 I seen a fence there before the railroad came there.

Q. Did you go clear around that fence in '77?

A. Yes, I went clear around; the road goes right around the fence.

Q. Now, how far down the creek from the *Lammlein* cabin— A. Yes.

Q. Did that old fence run in '77?

A. I suppose probably a quarter of a mile.

Q. How far up the creek?

A. Went up probably four or five hundred rods.

Q. How far back from the creek, away from the creek?

A. Well, on the west side it must be probably a quarter of a mile.

Q. Quarter of a mile? A. Yes, sir.

(Testimony of William Brown.)

Q. And was that on the upper end, up the creek end?

A. I don't know about on the upper creek end.

Q. Was this opposite the house?

A. This was above the house more than anything else.

Q. Did you follow the lines of the fence on the east side of the road, over toward the creek and across the creek?

A. I followed the road and it was fenced on the east side of the road for probably half or a quarter of a mile—

Q. Yes. A. From the fence.

Q. All right.

A. And the upper end, again, there was a fence on the west side.

Q. The west side of the road?

A. West side of the road, yes, sir.

Q. Now, let's get over on the east side of the road, the creek side.

A. On the east side is kind of a halfmoon there, and on the east side there was an old fence like that straight (witness indicates), and then on the west side there was fence up to the mountains as far as I know.

Q. What do you call the west side—the creek side or the other side?

A. No, the mountain side.

Q. I want you to get over on the creek side.

A. I called that the east side.

Q. Well, let's get over to the east side.

(Testimony of William Brown.)

A. East side of the road, yes.

Q. Now, how far out to the east from the road did the fences on the east side go?

A. Well, I couldn't hardly tell you more than that. I don't know that it was fenced there at all because there was a creek there. They followed the creek and I don't know if they fenced. I know they had a fence on the other side of the creek.

Q. That is, you know there was a line of fence along the road between the creek and the road, but you don't know whether that fence went beyond the creek or not?

A. No, I couldn't say.

Redirect Examination by Mr. LOEB.

Q. You said to Mr. Wallace that *Lammlein* went back to his native country. You don't know anything about where *Lammlein* was born, do you?

A. No, I don't.

Q. So you don't know but what he was born in the United States, do you?

Mr. WALLACE.—Object as leading.

A. What?

Q. You don't know that *Lammlein* was born in Germany, do you?

A. No, I don't know. He went to his old country, you know, like a good many did.

Q. But you don't know he was born in Germany, do you?

Mr. WALLACE.—Object as leading.

A. No.

Q. You do know, however, that he was a citizen of the United States?

(Testimony of William Brown.)

A. Well, I know he protested against my entering some land there in '72.

Q. Did he have to be a citizen to do that?

Mr. WALLACE.—Move to strike out the answer to the last preceding question as not responsive, and as involving hearsay action on the part of *Lammlein*, and specially object as immaterial.

Q. How do you know that he protested against some land that you entered?

A. Well, we had a suit in the land office.

Q. And where was this land located?

A. After we had the suit we compromised between ourselves, and we make a townsite out of it, out of that forty acres.

Q. At Silver? A. Yes, sir.

Q. And what makes you believe from that that he was a citizen?

Mr. WALLACE.—Object as immaterial and hearsay. A. What?

Q. And what makes you believe from the fact that he protested against your entering land, that he was a citizen?

A. I suppose no man could protest against anything in the United States land office unless he was a citizen.

Recross-examination by Mr. WALLACE.

Q. That is the only reason, Mr. Brown, that causes you to say here under oath that Mr. *Lammlein* was a citizen? A. Yes, sir.

(Testimony of William Brown.)

Redirect Examination by Mr. LOEB.

Q. You know that he voted, too, don't you?

A. Yes. I used to be judge of the elections up there often, and Mr. *Lammline* voted.

Q. So that the fact that he voted, and the fact that he protested against your entering some land at Silver for a townsite both make you believe he was a citizen?

Mr. WALLACE.—Object as leading.

A. Yes, sir.

Q. You saw him vote? A. Yes, sir.

Q. How many times?

A. Two or three times; three, I think, there was—maybe more.

Q. And you were a regular judge of the election when he voted? A. Yes, sir.

Q. That is, you were a regular judge of the election? A. Yes, sir, I was judge.

Q. How many times have you been judge of election at Silver?

A. Been judge of election since '64.

Q. Been judge of every election since '64?

A. Yes, sir.

Q. And do you recollect that *Lammlein* voted at least three times at Silver?

Mr. WALLACE.—Object as leading.

A. Yes, sir.

WILLIAM BROWN.

Subscribed and sworn to before me this first day of May, 1905.

HENRY N. BLAKE,
Examiner.

F. D. MIRACLE, a witness called on behalf of complainant, sworn and testified as follows:

Direct Examination by Mr. LOEB.

Q. Mr. Miracle, what is your name?

A. Frank D. Miracle.

Q. What business do you follow?

A. I am register of the United States land office.

Q. Residing at Helena, Montana?

A. Yes, sir.

Q. Have you, as register of the United States land office, in your possession the original of a letter written by Binger Hermann, Commissioner, to the register and receiver at Helena, Montana, under date of December 24th, 1898, involving the case of John Trodrick versus the Northern Pacific Railway Company? A. I have.

Q. Is this paper that I have in my hand, marked 9825, the original letter received? A. Yes, sir.

Q. Where did you get this from the files in your office? A. Yes, sir.

Mr. LOEB.—We now desire to offer in evidence this letter.

The EXAMINER.—Is this the original letter?

By the WITNESS.—Yes.

Mr. WALLACE.—We object as incompetent.

(Testimony of F. D. Miracle.)

Q. This letter came to you in the regular official correspondence from the commissioner to your office?

A. Why I found it in the regular official correspondence. It didn't come to me.

Q. And this letter that I have is the original letter that you found?

A. Yes, sir. I found it in our files.

Mr. LOEB.—We will now ask to have this incorporated in the record.

Mr. WALLACE.—Object as incompetent.

Mr. BULLARD.—Let me suggest that—

Mr. LOEB.—Is this a correct copy?

By the WITNESS.—It appears to be a correct copy of the original letter with the exception of the endorsements.

Mr. WALLACE.—I object to the offer of the original letter for the reason that, under the federal statute law, the correspondence of the United States land office is not made evidence and is not allowed to be withdrawn from the land office files for the purpose of being used in legal proceedings.

Mr. LOEB.—We offer the original letter, and with it we have a copy which we will have certified. Let the record show that the counsel for complainant, while identifying the original letter and offering it in evidence by the register of the land office at Helena, offers to supply the record with a certified copy of the letter, and will do so that the original may be kept in the files of the register of the land office.

Mr. WALLACE.—The defendant having objected to the original now offered, will object to the certified

(Testimony of H. L. Billings.)

copy when the same is tendered, if it should be objectionable.

By the WITNESS.—When I say this is a copy, the endorsements on the letter are not shown on the copy, that is the only difference.

No cross-examination.

FRANK D. MIRACLE.

Subscribed and sworn to before me this 25 day of March, 190—.

HENRY N. BLAKE.

Examiner.

H. L. BILLINGS, a witness called on behalf of the complainant, being sworn testified as follows:

Direct Examination by Mr. LOEB.

Q. What is your name, Mr. Billings?

A. H. L. Billings.

Q. What business do you follow:

A. Stockman and rancher.

Q. Where do you live?

A. About halfway between Wolf Creek and the Missouri River

Q. How long have you lived there?

A. Since '79. That is where I live right now, where I am living there now. I have been living there since '79.

Q. How long have you been in Montana?

A. Since '75.

Q. Did you know one Martin *Lammlein* during his lifetime?

A. I did, yes, sir.

(Testimony of H. L. Billings.)

Q. Do you know whether he was a citizen of the United States or not?

Mr. WALLACE.—We object to this question, and to any questions touching the qualifications of *Lammlein* to enter the land of the United States. The defendant objects on the same ground as assigned to similar testimony in the face of the preceding witness Brown, and I presume the same objection may stand to all that testimony from this witness.

Mr. LOEB.—Yes, sir.

Q. Do you know, Mr. Billings, whether *Lammlein* was a citizen of the United States?

A. To the best of my knowledge and belief.

Q. I will ask you if you have acted as clerk of the election at Wolf Creek?

A. Yes, sir, several times.

Q. I will ask you whose writing there is in this book. (Hands book to witness.)

A. Well, these two pages are mine. (Witness indicates second and third pages in the book.)

Mr. WALLACE.—It is here understood that the paper marked Complainant's Exhibit "A" is not offered in evidence.

Q. I will ask you whether you were one of the clerks of the general election held on the 6th day of November, 1888, at Cartersville precinct 20, Lewis and Clark County, Territory of Montana?

A. 1888?

Q. Yes.

A. Yes, I was.

(Testimony of H. L. Billings.)

Q. You know, Mr. Billings, whether one Martin *Lammlein* voted at that election?

A. Yes, sir, he did.

Q. How do you know that he voted at that election?

A. Well, by my recollection, and seeing his name on the roll there when you handed it to me just now. I enrolled it myself.

Q. This roll I hand you now is the official poll-book that was used at the general election held on the 6th day of November, 1888, at Cartersville precinct twenty, Lewis and Clark County, Montana?

Mr. WALLACE.—Object as leading.

A. To the best of my recollection that is my handwriting.

Q. And the names of the voters therein listed are in your own handwriting?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. Now, you said that you saw that *Lammlein* voted at that election?

A. Well, if he hadn't voted there I would not have enrolled his name there among the voters, and he would not have passed the judges without being challenged and thrown out, for I was clerk and enrolled every name.

Q. Was this book that I have marked Poll-Book, General Election held on the 6th day of November, 1888, Cartersville precinct twenty, Lewis and Clark County, Montana, marked Complainant's Exhibit

(Testimony of H. L. Billings.)

"B"—was that the original poll-book that was used there at that election—the official poll-book?

A. Well, yes, sir; this was the official poll-book. I used it and I suppose you would have to go to the proper custodian of these records to get it.

Q. This is the book that we have shown you?

A. Yes, that is my handwriting, and I have never written any duplicate of that to my recollection.

Mr. LOEB.—I would like to have this offered in evidence now, please.

Mr. WALLACE.—We object to the offer of the poll-book, or the portion that is offered. I do not object to the fragmentary offer at all, but I do object to it in this way on the ground that the said poll-book does not come into this court accredited as provided by law, but stands discredited in that it has manifestly been for some period of time out of the custody of the proper official; second, the same is not identified as provided by law; third, as a discredited poll-book, the condition of the book is not so explained by the evidence as to entitle it to be offered or used in evidence.

Q. Mr. Billings, I will ask you to look at Complainant's Exhibit "B" and say whether that is in the same condition as it was when you returned it, or whether any alterations or changes have been made.

A. Well, that would be a hard thing to trust to memory of sixteen years. Now, here has been a little clerical error which we corrected. Some one in swearing me—it has been corrected—this clerk here

(Testimony of H. L. Billings.)

being sworn while I accidentally signed it again and my name has had a pen run through it.

Q. That is on page one. But has the list of voters, as the name of Martin *Lammlein* appears as one of the voters, the thirteenth voter who voted that day, on page two of said book—has any change been made there as it was written originally at the time of the election?

A. No change has been made except that a little cross has been made opposite thirteen.

Q. There is a cross in lead pencil right opposite to the name of Martin *Lammlein*?

A. Yes, to the left of it.

Q. Do you find the entire column of names in which *Lammlein's* name appears exactly the same as it was when you entered the names there in '88?

A. Yes, sir, exactly the same to the best of my belief. I don't see any corrections.

Q. You didn't write the name of Martin *Lammlein* in there any other time except on the 6th day of November, 1888? A. No, sir, I did not.

Q. And it is in there in your handwriting?

A. Yes, sir, that is my handwriting, or else it is a clever imposture or forgery.

Q. Is this your signature, Mr. Billings, on the official return certificate put there on the 6th day of November, 1888, H. L. Billings?

A. Yes, sir, that is my handwriting.

Q. Hasn't been changed since 1888?

A. No, sir, I can't see it has been touched.

(Testimony of H. L. Billings.)

Q. You have not written it in there since that time?

A. No, sir, have not seen the book since then.

Q. You have not seen the book since '88?

A. No, sir, not that I know of; have had no occasion to.

Q. And the name of Martin *Lammlein* is written in the book as being a voter, by you?

A. Yes, sir, that is my handwriting.

Mr. LOEB.—We offer it again, after these questions.

Mr. WALLACE.—Object for the same reason again.

No cross-examination.

H. L. BILLINGS.

Subscribed and sworn to before me this 2d day of June, 1905.

HENRY N. BLAKE,

Examiner.

Mr. WALLACE.—Mr. Loeb, as to the letter marked Plaintiff's Exhibit "A," will you be kind enough to state in the record the purpose for which you propose to offer the certified copy and have offered the original?

Mr. LOEB.—Well, I don't know that in the light of your objection—I don't know that I am called upon to state the purpose at this time.

Mr. WALLACE.—Then I object to the letter, and will reserve the right to object to the copy when offered in evidence, each and both, for the reason that

the same is not of itself a judgment as to any of the matters or things therein recited, and is not binding upon this defendant, the Northern Pacific Railway Company, in its recital or otherwise; and because the same is incompetent, irrelevant and immaterial upon any issue tendered under these pleadings.

Mr. LOEB.—Counsel for complainant suggests that one of the reasons for offering the letter is that counsel for the defendant, Northern Pacific Railway Company, objects to the introduction of any testimony in this case, for the reason that the matter has already been litigated in the land office, and the letter marked Complainant's Exhibit "A" is a judgment of the land office—a final judgment of the land office in this matter, so far as it was investigated in the land office, and shows, too, the reasons why the *Trodrick* entry was denied, and also shows that the matter now being investigated was not at issue in the land office as claimed by counsel for the railroad, and was never investigated by the land office. There are other reasons for which the letter will be used by counsel for the complainant, which counsel does not see fit at this time to announce.

Mr. WALLACE.—The defendant railway insists that the objection interposed by it was that the patent was conclusive upon the issues sought to be investigated, and no other objection was interposed in this proceeding.

FRANK L. REECE, a witness called on behalf of the complainant, being sworn, testified as follows:

Direct Examination by Mr. LOEB.

Q. Mr. Reece, what is your full name?

A. Frank L. Reece.

Q. Where do you reside, Mr. Reece?

A. Helena, Montana.

Q. How long have you resided in Helena, Montana?

A. About thirty-two years.

Q. Mr. Reece, what business are you following now—what official position have you?

A. I have followed the position of being a mining attorney and am now a justice of the peace.

Q. Of Helena township, Lewis and Clark County, Montana?

A. Yes, sir.

Q. Did you know David Auchard in his lifetime?

A. I did.

Q. Do you know Mr. *Trodrick*—John *Trodrick*?

A. I do.

Q. Do you know the land that Mr. *Trodrick* sought to enter in the land office as a homestead?

A. Only by description.

Q. Well, did you act as Mr. *Trodrick's* attorney in that matter?

A. I did.

Q. What have you to say as to whether Auchard, David Auchard, knew of the claim that *Trodrick* had upon the land that he sought to enter in the land office, and described in the bill of complaint as the southeast quarter of section thirty-five, township

(Testimony of Frank L. Reece.)

number fifteen north of range four west, Helena land district?

A. I will say this: That some years ago Mr. *Trodrick* and a civil engineer, I have forgotten his name—a surveyor—came to me and asked me to fix the boundaries of the land upon which Mr. *Trodrick* had filed. At that time a completed survey had not been filed, but from a plat given to me by the surveyor, the improvements of *Trodrick* were upon the south half of section thirty-five, township fourteen north of—no—yes, I think that is right. Fifteen north, or is it fourteen north?

Q. Never mind about the description.

A. The south half of section thirty-five—beg your pardon, I believe I can tell you what it is—fourteen north 3, which corners with fifteen north four, where Baxter's ranch is situated. That is the way I fixed it by connection—section thirty-one, which a part of Baxter's ranch is in.

Mr. WALLACE.—The defendant moves to strike out so much of the statement of witness as relates to what appeared as the whereabouts of the improvements upon the map or plat shown or handed him by some surveyor, on the ground that the same is secondary evidence.

Q. What have you to say, Mr. Reece, as to whether Auchard did or did not know that *Trodrick* had entered for homestead purposes the southeast quarter of section number thirty-five, township number fifteen north of range four west?

A. Beg your pardon; read that question again.

(Testimony of Frank L. Reece.)

Q. What have you to say, Mr. Reece, as to whether Auchard did or did not know that *Trodrick* had entered for homestead purposes the southeast quarter of section number thirty-five, township number fifteen north of range four west?

A. I know this: that Mr. *Trodrick* presented a homestead application at the Helena land office.

Q. I am not asking about Mr. *Trodrick*, Mr. Reece. I am asking you whether you know that Auchard knew of *Trodrick's* claim. Did Auchard know that?

A. Mr. Auchard certainly knew it.

Q. How do you know that he knew of *Trodrick's* claim?

A. Because he approached me, sir, and asked me to throw *Trodrick*—if you want me to tell you all about it I will.

Q. Yes. What do you mean by saying that Auchard approached you and wanted you to throw *Trodrick*?

A. Because he approached me and told me that he would pay me money to throw *Trodrick*. That is it.

Q. So, from the fact that he approached you and offered to pay you money to throw *Trodrick*, you were satisfied that Auchard knew of *Trodrick's* claim on the ground?

Mr. WALLACE.—Object to the question as leading and incompetent.

(Testimony of Frank L. Reece.)

Q. Well, I will ask you this question, Mr. Reece.

A. Yes, sir.

Q. How do you know that Auchard knew of *Trodrick's* claim?

Mr. WALLACE.—Object as repetition.

Mr. LOEB.—You can answer the question now.

A. Give me the question, please.

Q. How do you know that Auchard knew of *Trodrick's* claim?

A. For the same reason that he had come and told me that he had purchased the right of the Northern Pacific railway to the land.

Q. And what else did he tell you besides telling you he had purchased the right of the railroad to the land?

A. I won't say anything at all that he said that time. If you will put the questions to me I will.

Q. Well, what else did he tell you, Mr. Reece, when he told you that—when he approached you?

A. He said, "We will let that slip—let that go, and I will make it good to you."

Q. How long ago was this?

A. Oh, it was several years.

Cross-examination by Mr. WALLACE.

Q. Mr. Reece, you know that Mr. Auchard is now dead, David Auchard?

A. Yes, sir, I do.

Q. Did both these statements occur at the same time—the one in which he told you that he had purchased or bought the right of the railroad to the land, and his statement to you to let that go, or let it slip and he would make it good to you?

(Testimony of Frank L. Reece.)

A. No, sir.

Q. Which was the earlier?

A. I think the first you have spoken of, sir.

Q. That is, he first came to you and told you that he had bought the right of the railroad to the land?

A. Yes, sir.

Q. And he told you that seven years ago?

A. I don't think seven years ago. I said several years ago—several, not seven.

Q. It was not as long ago as seven?

A. It may have been.

Q. But you don't want to be understood as saying that it was? A. I said several.

Q. That is the best you will do for us?

A. Yes, sir.

Q. You cannot fix it? A. Cannot.

Q. How long after the first talk did the second one occur?

A. Mr. Wallace, I can't tell you that. I want to fix it just as well for you as the other party, though.

Q. Oh, I don't question that, Judge, for a minute, and I want to fix it for them as well as for myself, as closely as I can. A. Yes.

Q. You can't tell, then, whether the two talks that you had were in the same year or not?

A. I wouldn't state positively, Mr. Wallace, that they were.

Q. Are you able to fix the season of the year in which the first talk took place, in which he told you he had bought the right of the railroad to the land—whether it was spring, summer, autumn or winter?

(Testimony of Frank L. Reece.)

A. I don't know, Mr. Wallace.

Q. Are you able to fix the season of the year when the second talk took place, whether it was spring, summer, autumn or winter?

A. Mr. Wallace, I can't tell you.

Q. You have tried to give us Auchard's statement in words as near as you can remember it, as to each talk, have you, Judge? A. I have.

Q. And it is because of these statements of Auchard's, and on account of them, that you base your knowledge and belief as to his knowing about *Trodrick's* claim—that is the reason?

A. Not wholly.

Q. What is that?

A. Not wholly, if I understand you right. Put that question to me again.

Mr. WALLACE.—I will withdraw that question.

Q. Did you not state to Mr. Loeb that you believed, or knew, that Auchard knew of *Trodrick's* claim on account of a talk or talks between yourself and him? A. That is right, sir.

Q. And have you not told us the talk or talks between yourself and him that you refer to?

A. Yes, sir, that is right.

Redirect Examination by Mr. LOEB.

Q. In all the talks you had with Mr. Auchard he always knew, didn't he, or said he knew—led you to understand that he knew that *Trodrick* was claiming the land as against the railroad?

Mr. WALLACE.—We object to that on the ground that it is leading and calls for a conclusion of the wit-

(Testimony of Frank L. Reece.)

ness from talks with Auchard, rather than statements of Auchard themselves, which statements were already in evidence.

A. Beg your pardon; read the question again.

Q. In all the talks you had with Auchard he always knew, didn't he, or said he knew—led you to understand that he knew that *Trodrick* was claiming the land as against the railroad?

A. Well, I should judge so, for the reason that he approached me and offered to give me money to quit the case. Yes, certainly; he offered me money to do it.

Q. When you say "offered you money to quit the case," what case have you reference to, Mr. Reece?

A. Why the case of *John Trodrick* versus the Northern Pacific Railway Company.

Q. Involving *Trodrick's* homestead entry.

Mr. WALLACE.—Object as leading.

A. Let me have that again.

Q. Did it involve *Trodrick's* interest?

A. Yes, as far as I knew without looking at the claim.

Q. He didn't offer you money to throw any other case than the case of *Trodrick* against the railroad?

A. Beg your pardon?

Q. Did he offer you money to throw any other case than the case of *Trodrick* against the railroad company?

A. No; no, no, sir.

Recross-examination by Mr. WALLACE.

Q. This case you refer to was one entitled *Trodrick* against the railroad company, Judge?

(Testimony of Frank L. Reece.)

A. Yes, sir, Mr. Wallace.

Q. On this occasion, when he approached you and offered you money to quit the case, was that the time when he actually said to you, "Let that go and I will make it good to you"? A. Yes, sir.

Q. That was what he said about it?

A. Yes, sir.

Redirect Examination by Mr. LOEB.

Q. You don't mean that the case was entitled *Trodrick* against the Railroad Company, do you? It was *Trodrick's* claim to enter land, wasn't it, in the land office — the railroad company hadn't sold the land to Auchard when he spoke to you about this?

Mr. WALLACE.—Object as leading.

A. I beg your pardon, Mr. Loeb, it was the application; it was to apply for the southeast quarter of section thirty-five, fifteen north, four west, which was rejected.

Q. And that was the proceeding in which Auchard offered you money to throw *Trodrick*, was it?

A. It was after the only decision was made, I think.

Recross-examination by Mr. WALLACE.

Q. The claim had already been rejected when the talk was had with you?

A. I think so, Mr. Wallace. I can't fix the date, Mr. Wallace; I am trying to do the best I can for you.

That is all, Mr. Reece.

FRANK L. REECE.

(Testimony of Charles Worth.)

Subscribed and sworn to before this 14th day of March, 1905.

HENRY N. BLAKE,
Examiner.

CHARLES WORTH, a witness called on behalf of the complainant, sworn and testified as follows:

Direct Examination by Mr. LOEB.

Q. Mr. Worth, take a seat.

A. Now talk load, please.

Q. What is your name?

A. My name is Charles Worth.

Q. Where do you live?

A. I live down to Gleason's Siding.

Q. How long have you lived there?

A. I lived there since '80.

Q. Do you know Mr. *Lammlein* in his lifetime?

A. Yes, sir.

Q. Do you know whether he was a citizen of the United States or not? A. Sir?

Q. Do you know whether he was a citizen of the United States?

A. He must be a citizen; he had all the rights, and he voted the same as any other citizen.

Mr. WALLACE.—Move to strike out his answer, except the statement "He voted the same as any other citizen."

By the WITNESS.—I never had no occasion to ask him for his citizen papers.

Q. When did you first know Martin *Lammlein*?

A. I know him in '67.

(Testimony of Charles Worth.)

Q. How long did you know him after '67?

A. I know him ever since '67 until he died here in '89 or '88.

Q. When did you first know Martin *Lammlein* at Wolf Creek? A. I know him in '75.

Q. Were you living there then?

A. No, I was living right there at Silver.

Q. When did *Lammlein* go to Wolf Creek?

A. In '74, sometime in '74.

Q. You know where the southeast quarter of section thirty-five township fifteen north of range four west is?

A. No, I don't know anything about any quarter sections. No, I have no occasion to become interested in these quarter sections.

Q. You know where Mr. *Trodrick* lives now?

A. Yes, sir.

Q. Do you know the land that *Trodrick* is living on now? A. Yes, sir.

Q. Is that the same land that Mr. *Lammlein* owned?

A. Mr. *Trodrick* lives in the same cabin Mr. *Lammlein* put up in '75. He put up the house and lived in it and died in it.

Q. And the land around that house is the same land?

A. To be sure, except the washout in '92 washed some of it away. The gravel is there, but the soil isn't there to this date.

Q. What kind of crops did *Lammlein* raise?

(Testimony of Charles Worth.)

A. Potatoes and cabbage and a little onions, and a little oats for his horses.

Q. How early did he raise that?

A. How early?

Q. Yes, what year? A. Why every year.

Q. What year did you first see any crops?

A. Sir?

Q. What year did you first see any crops there?

A. Why in '84; I plowed for him right there in the same patch where they plow to-day in Wolf Creek.

Q. You plowed for Mr. *Lammlein*?

A. Yes, I plowed for *Lammlein*.

Mr. WALLACE.—You allow the same objections to stand to the testimony of this witness as in the case of the witness Brown.

Mr. LOEB.—Yes, sir.

Q. You plowed some of the land, then, in 1884 for *Lammlein* yourself, which is the same land as *Trod-rick* now has?

A. The same as it is to-day except what washed away in '92; you see the creek changed since the railroad washed it down there.

Q. Mr. *Lammlein* was elected justice of the peace at one time wasn't he?

A. He was elected justice of the peace here in '72, right there in Silver City, and I was elected constable, but we never qualified.

Q. Did *Lammlein* take an interest in election and politics?

(Testimony of Charles Worth.)

A. He was a good, stout Democrat, yes; and I am the opposite. We had many arguments. He ran the time here that Mr. Clegget ran for representative in Congress and beat Mr. Warren Toole that fall.

Cross-examination by Mr. WALLACE.

Q. The reason that you know that *Lammlein* was a citizen, Mr. Worth, is because he voted, isn't it?

A. Well, no, not altogether. Here in '72 Mr. Brown and Mr. Green—he died in Benton, you know—*marsh* surveyed that townsite down there, and there was forty acres there that three parties claimed for a townsite, and Brown and Green they claimed it, and Mr. *Lammlein* contested it right over in the land office. Mr. Colonel Sanders defended *Lammlein* and Mr. Shober handled the case for Mr. Green and Mr. Brown. Now, that is a question of course I don't know about. Has a citizen the right to contest a man's entry in a land case?

Q. Well, you come down to my office and we will talk that over to-night.

A. You see that is a principle of law.

Q. No, Mr. Worth, the reason why you said *Lammlein* was a citizen was because he voted, and because of this land contest?

A. Yes, sir.

Q. All right.

A. He had all the privileges like I have, and I could show papers provided it is necessary. I had never any occasion to ask Mr. *Lammlein* for his citizen papers.

(Testimony of Charles Worth.)

Q. Now, you plowed for *Lammlein* in '84. Well, did you plow—by the way, you know where the old Benton stage road was?

A. Yes, Mr. Wallace. Here is a rough sketch here. Here is, starting in the west—here is the house, that was the house that Mr. *Lammlein* started to build in '75.

Q. Can I mark that A?

A. Well, yes. Now, here is some fences, mind you, around the garden.

Q. Yes.

A. And the fence is to-day in there. They are raising a garden in here to this date.

Q. Can I mark that fence B?

A. Just as you please. Now, the person that lives there, he built a house there, a residence, for him and his wife.

Q. Can I mark that C?

A. All right; mark it whatever you please. Now opposite the residence is the old stable.

Q. Can I mark that D?

A. Yes. Now, here comes Mr. Forman's three-story boarding-house.

Q. Can I mark that E?

A. Yes. Now, here is the old slab stable and the hotel. *Lammlein* had his horses in the stable when he lived and died there.

Q. Can I mark that F?

A. All right. Now here is a public hall.

Q. Can I mark that G?

A. That Mr. *Trodick* built.

(Testimony of Charles Worth.)

Q. Can I mark that G?

A. Yes. Now, here is a house that belongs to Mr. Bissonette. He built it there.

Q. Mark that H?

A. Yes. Now here is Mr. Forman's three-story stable here.

Q. Can I mark that I?

A. Now, that is a store.

Q. All right. Whose store is that?

A. Belongs to Burns and Company.

Q. We will mark that J.

A. Now, here comes Mr. Bray's saloon.

Q. Mark that K.

A. The property belongs to Mr. *Trodrick*. Now, here is McDonald's brick saloon.

Q. Mark that L.

And here is an old shack here. Mr. McDonald had a saloon here before he built that brick saloon.

Q. We will mark that M.

A. Now, here is another stone frame building here. The foundation is stone and the top is frame. That belongs to McDonald, or rather his mother.

Q. We will mark that N.

A. Now, here is the place that Al. McDonald built for a store. He sold that to Billy Reinig.

Q. We will mark that O.

A. And here is the section-house.

Q. We will mark that P.

A. All right. Now, here before the washout was in here, that is the way the land lays here. The creek ran right through here, and in '92 the washout—

(Testimony of Charles Worth.)

Q. May I mark that line that you indicate as the creek with the word creek?

A. That is the little Prickly Pear. Now, you see, after the railroad washed out, the creek cut right through here, so. That cut the piece of land that *Lammlein* had there.

Q. May I mark this new creek channel?

A. Yes. But you must remember—you see, on the other side, on the south side from the railroad, this is government land in here—after the survey. The creek runs right behind this store, and behind the stable and behind the public hall and behind the blacksmith-shop here. I could make you a better sketch but I had no time.

Q. Mr. Worth, the creek doesn't run through the depot? A. No.

Q. You have shown it there, and we will take it out of the depot, please.

A. No, it don't run through the depot.

Q. Well, take it out of the depot back here.

A. You see, here is the station, and this is the railroad track here.

Q. Now, how far from the station is it back to the creek now?

A. Well, it may be at the most three rods.

Q. Three rods?

A. Yes. The railroad company put a bridge across from the store. Now, here they put a bridge across the creek here.

Q. Where is the water-tank?

(Testimony of Charles Worth.)

A. The water-tank is on this side, right opposite the store.

Q. Mark the water-tank, please.

(Witness does so.)

Q. We will mark that R. A. Yes.

Q. How far is it from the water-tank back to the bridge?

A. It ain't no farther than from the station to the creek.

Q. Is it one hundred feet, thirty steps?

A. Well, I couldn't say exactly; it may be three rods or four rods. It ain't far from it.

Q. Isn't it fully sixty yards?

A. Well, let me go down there and measure it and I can tell you.

Q. You can't tell without measuring it?

A. No.

Q. When you show the creek as running through P, the section building, that is not correct on the map. It should be out here.

A. The creek runs right between the store and the section-house, and the station is a little beyond.

Q. Now may I mark this bridge, these two lines here?

A. Well, the bridge is this side of there; it is a little beyond the store, down here.

Q. Well, you just mark it, then.

A. If I knowed you wanted all these particulars I would have marked it off.

Q. Well, we will call the bridge S. A. Yes.

(Testimony of Charles Worth.)

Q. Now, this E represents the fence lines as it was when you first knew the place? A. Yes.

Q. And as you remember it?

A. Yes. When *Lammlein* built it there he put fences around there, and there is a fence to this day around there.

Q. How much was inside of that fence where B is, how much land?

A. Well, I don't think it is hardly—well, it can't be—

Q. Half an acre? A. Yes, just about.

Q. That was all the fence there was at this time along the road?

A. No, there was a fence here. (Witness indicates.) This was a log fence here.

Mr. LOEB.—Let's mark these fences, please.

Mr. WALLACE.—Wait until I get through with the witness, please.

Q. Now, there was a fence running along the old Benton road in the direction of O?

A. Yes, sir.

Q. What became of that fence?

A. I don't think they kept it in repair, or something.

Q. It dropped down? A. Yes, sir.

Q. Well, where did that fence go to?

A. Well, it ran right against the mountain. There is a mountain coming down near where the stone house stands.

Q. The stone is really at the foot of the hill?

(Testimony of Charles Worth.)

A. It is stuck in the mountain, a portion of it.

Q. A portion of the house in the mountain?

A. Yes, the back end is.

Q. How far is it from the stone house O, over to the railroad track? A. I can't say.

Q. Farther than across this room?

A. To the railroad track, why it must be three or four times.

Q. The distance across this room?

A. Yes, sir.

Q. And what would you estimate the distance across this room to be? You can pace it if you want to. (Witness does so.)

A. Sixty feet. How much did I miss it?

Q. I will pace it after a while and we will compare. Let that go at present. Now, whose place was this that we have marked C?

A. That belongs to Mr. Bissonnette.

Q. When was that built there?

A. It was built here a short time ago, a year or so, or more.

Q. On this land that you are talking about?

A. Of course.

Q. Whose place was this you marked D?

A. The blacksmith-shop.

Q. Bissonnette's?

A. Bissonnette's. He bought that from a fellow by the name of—I don't remember the name, but this blacksmith-shop was here for three or four years, mind you.

(Testimony of Charles Worth.)

Q. And this land that we are talking about, was it on that?

A. Yes, all them buildings are on that land.

Q. All these buildings?

A. Yes, sir, all these buildings.

Q. Well, now, where was this field that you plowed?

A. Well, it was right inside of here, between here and here. (Witness indicates.) Right in here.

Q. Between the old Benton road and the creek?

A. Yes, right in here. (Witness indicates.)

Q. You didn't plow any across the old Benton road? A. No. He used to spade that.

Q. Used a spade? A. Shovel.

Q. How much did he have broke up that he used a spade to shovel on? A. I couldn't say.

Q. Fifty acres? A. Oh, no.

Q. How much do you think—half an acre?

A. A quarter of an acre or something like that; there was fifty acres in the whole shooting match here.

Q. In the whole bottom?

A. In the whole bottom.

Q. How far do you think it was, Mr. Worth, from the creek here clear out to this building, we will say E? A. That is Forman's building.

Q. Yes. From Forman's building over to the old creek channel.

A. Oh, now that might be three hundred feet.

Q. How far was it from the creek channel out to the hills on that side?

(Testimony of Charles Worth.)

A. Well, here it runs pretty near to the hills.

Q. The creek channel was pretty near to the hills?

A. Yes, sir.

Q. So that the bottom over in the bed of the canyon was about three hundred feet wide, as near as you can figure it?

A. Yes, at least.

Q. And then the mountains begin on each side?

A. On each side, yes; and another time a fellow put a water-wheel up in here—a fellow by the name of Morrison—he put one of them water-wheels in here to irrigate that flat. The spring the high water came it took the foundation out and it took the water-wheel out onto the school section.

Q. Can we mark that water-wheel T?

A. Just as you like.

Q. Morrison built that?

A. Yes, sir.

Q. What was Morrison doing over on that land?

A. He built that water-wheel for Mr. *Lammlein* to irrigate this flat here.

Q. How much ground in that flat did you plow in the year '84 for *Lammlein*?

A. I plowed a couple of days there; I don't know; I suppose I plowed two acres a day.

Q. About four acres?

A. I didn't finish it, because I had some plowing to do of my own.

Q. Was there broken ground that you didn't re-plow?

A. There was ground that had been plowed before.

(Testimony of Charles Worth.)

Q. How much of the old plowed ground did you replot? A. That I couldn't say.

Q. How much of the plowed ground did you leave unplowed? A. I don't know.

Q. Did you plow half of it?

A. I couldn't say that.

Q. Two-thirds?

A. I plowed a couple of days, and then he had to get somebody else to plow and finish it.

Q. And you don't know how much the other man plowed, or how long he plowed? A. No.

Q. Of course you would have an idea how long it would have taken you to finish it?

A. No, I wouldn't, because I was always neighborly to him and because I never could go by if there was anything of that kind to do. They was old folks and I would help them.

Q. You can't give us any idea as to whether you plowed half or two-thirds of that field in that place?

A. No. They are old folks and I never went by that place but, if they had something to do, that I would do it freely.

Q. Your map shows quite a little settlement on this ground?

A. Yes, but the time *Lammlein* was there before the railroad come in there, there was no one but *Lammlein* living there.

Q. *Lammlein* was the only man before the railroad came? A. Yes, sir.

Q. Can you tell us when the railroad came?

(Testimony of Charles Worth.)

A. The railroad came—well, they drove up the roadbed there in '87.

Q. In '87?

A. Yes, and that year they couldn't finish it, and the next following year they put down the rails.

Q. So that this settlement has sprung up since '87?

A. Since the railroad was built; yes, sir.

Mr. WALLACE.—This sketch will be marked Complainant's Exhibit "C."

Redirect Examination by Mr. LOEB.

Q. Now, which would be north, Mr. Worth?

A. North?

Q. Yes, mark north on that plat you made, Plaintiff's Exhibit "C."

A. This is north here. (Witness indicates.)

Q. Is that correctly marked north?

A. Yes, sir. Well, it isn't exactly. Well, here is the road—

Q. Mark the road first.

A. Well, here is the road; that is the public roads. That runs right there. (Witness indicating.)

Q. We will mark that X.

A. That is the road.

Q. Now, where do you mark south?

A. Well, it must be here.

Q. This point?

A. Yes, sir. You see I live on the Montana Central right here.

Q. This would be east over here?

A. Yes, east. And this is kind of west (witness indicates), but of course it isn't exactly. You see

(Testimony of Charles Worth.)

when I come down to Wolf Creek I strike here Bissonnette's house or blacksmith-shop, and then Forman's house—and this is Gray's saloon and then McDonald's saloon, and the store is right opposite where the postoffice is.

Q. Now, Mr. Worth, all these places that you have marked at Mr. Wallace's suggestion B, C, A, E, K, G, F, F, H, J, T, S, P, O, M, N, and L, are all on the land that *Lammlein* located on there in '77?

A. Every foot of it, yes, sir, on every foot.

Q. And this water-wheel that you say Morrison built?

A. Yes, sir.

Q. That is marked T—that is all on the land that *Lammlein* had?

A. He had possession of it at that time; yes, sir.

Q. And whatever land there was there was occupied by *Lammlein*, wasn't it. There was nobody else there at that time?

A. By *Lammlein*. And outside of this there is steep mountain like Mount Helena here, only they wasn't quite as steep.

Q. There was no room for anybody else to get in there but *Lammlein*?

A. Yes, he had all that corralled. There was a log fence a man by the name of Brown hauled the logs there.

Q. You want your testimony to be understood that the place where the water-wheel was built, that Morrison built, and D and F and G and H and J and T and S and R and P and O and M and N and L and

(Testimony of Charles Worth.)

R and E and A and B and C are all on land that *Lammlein* had under cultivation at that time?

A. Had under cultivation at that time, yes. Of course if I had thought you had asked me about all this, I could have inquired and given you satisfaction.

Q. But these houses you have marked are all on the same ground?

A. That *Lammlein* had under cultivation.

Q. And that is the same ground that *Trodrick* has got there? A. Exactly.

Q. Now, what did Morrison build this water-wheel for?

A. Now, that was a wheel with buckets on the side, you understand, like this (witness indicates). It would get the water out of the creek to irrigate this flat with.

Q. It was to get water out of the creek to irrigate the flat—that is, *Lammlein's* flat?

A. That was his flat where he raised his crop of potatoes and cabbage on.

Q. He built that wheel for *Lammlein*, did he?

A. Yes.

Q. What year was that?

A. I couldn't tell you. I can't tell you now, but I could find out at Wolf Creek.

Q. About what year. It was before *Lammlein* died, wasn't it?

A. To be sure. And I know how he paid for him. He gave Morrison two cows to build that wheel, but the trouble was here; he put that wheel in in the

(Testimony of Charles Worth.)

winter, mind you, and in the spring the high water came and washed the foundation away and the wheel went down the creek and he never had the benefit of it.

Q. But all of this land west of the railroad with all these houses on it was all in *Lammlein's* enclosure, in *Lammlein's* fences? A. Yes.

Q. And where did you mark the fence?

A. Here is the fence right here. (Witness indicates.) See? And them buildings stands a little back of the fence. Forman's house and McDonald's saloon and Bray's saloon stands right against the road. Now, here is a little old shack that McDonald occupied as a saloon, that stands a little back—he kept a kind of a grocery store in here, and that stands a little back from the road a ways—the building stands a little back from the road. He kept a store in there and sold to Billy Reinig.

Q. Did the railroad come right through *Lammlein's* land? A. Yes, right through it.

Q. The land he had fenced?

A. The land he had fenced. And here Judge Eddy, he fixed it up; he paid the money to him for a right of way.

Q. How many acres did you say were included in this land that *Lammlein* had fenced there, including all these buildings?

A. I would have to make a guess on that.

Q. What would be your guess work?

A. Suppose we will say thirty acres. I couldn't say for sure.

(Testimony of Charles Worth.)

Q. And all these marks that Mr. Wallace put on this map, G, F, H, etc., are all on the land that *Lammlein* had under cultivation?

A. To be sure. Because when *Lammlein*, after the road was throwed up here, and the rails was strung out, mind you, there was nothing put that house that Mr. *Lammlein* lived in and died in it, and that old stable beside his house there, the little slab stable that is there to-day, mind you.

Q. There are thirty acres in this tract of land that you have marked on your map. But wasn't there some other land to the east of the creek?

A. There was a little, yes.

Q. That he was using as pasture, and so forth?

A. Yes, sir.

Q. And wasn't there some more land to the south that he was using?

A. Well, all brush; yes, sir.

Q. Well, was there some land to the north he was using?

A. All brush; yes.

Q. And was there some to the west? So that there was more acres than thirty?

A. Yes, but it wasn't worth cultivating.

Q. When you said there were thirty acres there you meant cultivatable acres?

A. Yes, sir.

Q. You meant the land could be cultivated?

A. Yes, sir. There is another flat right above Forman's house and *Trodrick's*. You see there is a little kind of creek or draw comes in here, and Forman built a slaughter-pen up here. *Lammlein* had a little garden up here, and there was a little water

(Testimony of Charles Worth.)

here, and they built that water-wheel to get the water down here to irrigate that garden right in front of his house.

Q. That was the water from what creek?

A. A little kind of a spring.

Q. We will mark that Y.

A. Yes. Forman, he raised vegetables up there where Mr. *Lammlein* raised them up there. I know, because I am so well posted in that country.

Q. Do you know something of the value of the *Trodrick* place down there or the *Trodrick* enclosure—do you know how much it is worth?

A. The way it stands now, the buildings and these buildings here?

Q. Yes.

A. Well, I would give five thousand dollars for it and go up to the bank and borrow the money to pay for it. You see, two saloons, one store and a blacksmith-shop and a boarding-house.

Recross-examination by Mr. WALLACE.

Q. Mr. Worth, you meant that you would give five thousand dollars for the land with all the buildings on it as they are now?

A. To be sure, with the buildings on it and with the improvements.

Q. Well now, there is one brick saloon there?

A. Yes, sir.

Q. There is one stone building?

A. Well, it is half stone and the other half is frame.

Q. And the rest of the buildings are frame?

(Testimony of Charles Worth.)

A. Frame, yes, sir.

Q. Now, you have told us that you consider the distance across the bottom of the canyon at that point to be three hundred feet, at least three hundred feet?

A. More or less.

Q. That is, as near as you can estimate it?

A. Yes.

Q. And *Lammlein* was claiming that entire distance from the foot of the mountain on the one side to the foot of the mountain on the other side?

A. Well, he was cultivating it and using it.

Q. And how far up and down the creek was it from this building up here, the last building this way, marked O, to the last building this way, Bissonnette's dwelling, marked C? What was the distance up and down?

A. I couldn't say.

Q. I don't want you to say exactly, Mr. Worth, but you have an idea—you have an idea of the thing in your mind?

A. Yes, I would go home and take a fifty-foot measure and would give you exactly the correct figures.

Q. You could go home and measure and give it to me correct?

A. Yes, sir.

Q. But you made an estimate for me across this way.

A. But I may be a little short of that some.

Q. Or you may run a little long?

A. Well, I wouldn't offer an estimate before I am sure of that. I wouldn't want to overestimate it.

(Testimony of Charles Worth.)

Q. Well, now, you wouldn't overestimate it, but as you have made an estimate across this way, won't you kindly estimate it up and down this way?

A. You see I don't know the space between the places, here.

Q. We will go along the road.

A. Well, you see I am giving you an estimate. You may have a man go up and measure it down there and show me wrong. Now, don't bother me with that question.

Q. Yes, we might do that, but I want your estimate.

A. I can't give you no satisfaction, but I will measure it for you and give you exactly the distances.

Q. Now, what is this building that is marked F?

A. That is the old slab building.

Q. How far is it from the Bissonnette blacksmith-shop to the *Lammlein* stable?

A. I don't know. Now, please put on a piece of paper what you want and I will go down there and give you the exact figures.

Q. I am sure, Mr. Worth, if I put it down you could give me the correct figures.

A. If I had known what sort of questions I had to answer I could have give it to you exactly.

Q. Would you say it was over a quarter of a mile from this house, O, down to the dwelling C?

A. I don't know. Just make out your list and I will satisfy you.

Q. Would you say it was three hundred yards?

(Testimony of Charles Worth.)

A. I will not. I can't give you no satisfaction now.

Q. Wait a minute, Mr. Worth. Tell me, then, if you figured on a width of three hundred feet across the bottom from side to side on the canyon, what length did you use, what distance did you use in figuring that total area in here at thirty acres? Now, what length did you use to figure that? What length did you multiply?

A. I didn't multiply no length; it was just guess-work.

Q. Well, you guessed it across here at three hundred feet.

A. More or less.

Q. Well, what did you guess this here, this way. more or less?

A. I wouldn't guess on that.

Q. You would want that distance to reduce that ground to acres?

A. I didn't measure it; I just took a rough guess across, but I can't make a guess as to the length.

Q. You know what the frontage of a square piece of ground one acre would be?

A. No, I don't.

Q. If I told you it was two hundred and twenty-five feet square approximately, you would then be satisfied, wouldn't you, that if there was only about an acre or so across here, it would be too much to say it extended up and down here for nearly half a mile between these places?

A. You see the mountains run in kind of this shape (witness indicates) and the creek comes down a narrow place and it just winds out on the south side

(Testimony of Charles Worth.)

or east side, and on the lower end it comes to a point again, so.

Q. Where is Forman's hotel?

A. Why, it is right here.

Q. Couldn't a man stand at Forman's hotel and throw a stone over to Bissonette's blacksmith-shop?

A. Well, he might, but he must have stouter arms than I have.

Q. But you recognize that a man with a strong arm could throw a stone that distance?

A. Well, maybe with a sling-shot.

Q. No, but with his naked hand; take up a small stone and throw it?

A. Well, I don't know. Don't ask me nothing what I don't know.

Q. Could a man stand at Bissonette's dwelling there, and throw a stone to the blacksmith-shop?

A. That is just across the street.

Q. What is the distance across the *feet*—one hundred feet?

A. I don't know.

Q. Is it a mile?

A. I don't know.

Q. You are not willing to make any estimate?

A. No.

Q. Why were you willing to give an estimate of thirty acres when you won't give me this estimate?

A. That was all the surrounding land and the creek included.

Q. It would take all the surrounding land and up the creek quite a distance?

A. You would have to take the creek in.

(Testimony of Charles Worth.)

Q. Now, if we confine ourselves simply to the ground on the north end, the furthestmost building, and the furthestmost building on the south end, the building on the north end marked O, and the Bissonette dwelling marked C, and right across the bed of the canyon, you are well satisfied, Mr. Worth, that there wouldn't be any thirty acres in there?

A. What?

Q. In view of the fact that I am going to check up on you, you are well satisfied that there wouldn't be any thirty acres in there, aren't you?

A. I don't know.

Q. You wouldn't want to say there were thirty acres, would you?

A. Well, I estimated thirty acres; there might be less.

Q. Now, could a man stand at this Forman's hotel and throw a stone across the street to this building, J?

A. To the public hall?

Q. To J over there, the public hall.

A. From Forman's house?

Q. Yes. A. I don't know.

Q. Would you give us any idea how many steps you would take in walking across there?

A. No, I will not.

Q. You won't tell us the distance between any of these places or make any estimate of it at all?

A. No. You give me a chance to go down home and measure it and I will.

Q. I wouldn't have bothered you if you hadn't said there was thirty acres there.

(Testimony of Charles Worth.)

A. Taking the whole thing around, you know.

Q. How far above the buildings would you go to get the thirty acres in?

A. I would take the bluff right back of them buildings.

Q. How much of the bluff would you take?

A. Them bluffs might be a fifteen foot bank, there, and then it slopes back into a kind of a point.

Q. How far up the slope would you go?

A. I don't know.

Q. But you would go high enough to get thirty acres?

A. I would go to the point and on the other side. It turns in kind of a circle, mind you.

Q. You would go up on the hill and on the other side?

A. I would measure from the longest point across the creek to the longest point over here?

Q. And you would go up on the hillside as well as below? A. I don't know.

Q. Well, you would if it was necessary to get your thirty acres?

A. If I had to buy thirty acres I would try to get thirty acres of it.

Q. You are not satisfied you could get thirty acres by stopping in the bottom of the canyon, are you?

A. If I could get that in the bottom I would try to.

Q. But you think you would have to go up on the hill? A. I don't know.

(Testimony of Charles Worth.)

Redirect Examination by Mr. LOEB.

Q. But whatever area of that bottom, it was occupied by *Lammlein* in 1877?

A. '76 and '75 and '78, yes; it was occupied by nobody else but Mr. *Lammlein*.

Q. And was entirely occupied by *Lammlein*?

A. Yes, entirely.

Q. And it is the same bottom land that is now occupied by *Trodick*, is it?

A. Yes. You must remember that the whole bottom was nothing but a brush pile.

Q. Who cleared it out?

A. Old man *Lammlein*. He is the man that built that Wolf Creek; if it wasn't for him it would be a brush pile to this day.

CHARLES WORTH.

Subscribed and sworn to before me this tenth day of March, 1905.

HENRY N. BLAKE,

Examiner.

The EXAMINER.—We will take an adjournment until ten o'clock to-morrow morning.

HENRY N. BLAKE,

Examiner.

NICHOLAS HILGER, a witness called on behalf of the complainant, being sworn, testified as follows:

Direct Examination by Mr. LOEB.

Q. What is your full name?

A. It is Nicholas Hilger.

(Testimony of Nicholas Hilger.)

Q. How long have you lived in Montana?

A. About forty years.

Q. Coming here in what year?

A. Came here in 1864; in September, 1864, we arrived here.

Q. Did you know one Martin *Lammlein*?

A. I did.

Q. What have you to say as to when you first became acquainted with Martin *Lammlein*?

A. I got acquainted with him in Minnesota on the trip out here. He was in the emigrant train, and I got acquainted with him there as we assembled.

Q. How old a man was *Lammlein* in 1864?

A. I had an idea that he was about forty; somewhere in the forty years, along there.

Mr. WALLACE.—I would like it understood that the same objection is to stand to the testimony of this witness concerning *Lammlein* as was interposed to similar testimony of preceding witnesses or any of them.

Mr. LOEB.—All right.

Q. Do you know, Judge, whether he was a citizen of the United States or not?

A. There came a question up subsequently in regard to the townsite of Silver, where he had moved to several years afterwards, and to the entry of that townsite. He was one of the parties that was located in this townsite, the old Silver townsite, and there was a *content* pending in court to which townsite *Lammlein's* claim besides Green's and the others that were in the townsite, and the question as to his

(Testimony of Nicholas Hilger.)

citizenship was spoken of, and it was declared that there was not—that he was all right, that his citizenship was all right. Then I knew that he voted from the earliest time, and always acted as a full citizen.

Mr. WALLACE.—The defendants move to strike out the statement in connection with the Silver City contest, as made by the witness in substance that the question of his, *Lammlein's*, citizenship was spoken of, and it was declared that he was all right, upon the ground that the same is hearsay and incompetent and the townsite proceedings should not constitute an adjudication of his citizenship as to the world, or particularly as to these defendants.

Q. Judge, when these Silver City townsite proceedings were pending, what official position did you hold in this county? A. As probate judge.

Q. As probate judge of Lewis and Clark County, Montana?

A. Of Lewis and Clark County, Montana; yes, sir.

Q. And these proceedings relative to the entry of the townsite of Silver were had before you as probate judge, were they?

A. Yes. According to the law entries of townsites could be made either by the mayor of such a town, if there was such, or the probate judge of the county—either one could make the entry in the United States office on behalf of the residents thereof.

Q. And it was with reference to the townsite proceedings at Silver which were sought to be entered

(Testimony of Nicholas Hilger.)

by Green, Brown and *Lammlein*, that the question of *Lammlein's* citizenship was raised before you as probate judge?

Mr. WALLACE.—Objected to as leading.

A. Yes, the question was raised.

Q. That was finally conceded in that proceeding, was it, after examination?

Mr. WALLACE.—Objected to as leading.

A. Yes, that his citizenship was all right, and no further question was made of it, and the proceedings went on.

Mr. WALLACE.—The same motion is interposed to the statement that his citizenship was all right, and there is no further question as to it, as was interposed in the preceding answer of the witness, and all similar testimony previously given by the witness.

Q. What do you mean, Judge Hilger, by saying that you found his citizenship was all right?

Mr. WALLACE.—Object to this for the same reason.

A. No further objection—no objection raised any farther as to his citizenship—that he might go on and enter his portion of the townsite, his portion which he occupied at the time.

Q. Well, you mean to be understood as saying, when you say that his citizenship was all right, that he was a citizen of the United States?

Mr. WALLACE.—Objected to as leading.

A. Yes, the attorneys on both sides admitted it and no further question was raised—no objections raised as to his citizenship.

(Testimony of Nicholas Hilger.)

Mr. WALLACE.—We move to strike out the entire witness as pure hearsay, for the reasons hereinabove given in all preceding motions to strike.

Q. Will you explain to us what you mean, Judge, by saying that the citizenship of *Lammlein* was determined in that proceeding to be all right?

A. The question as to whether he was a citizen, as he spoke the German language, and the question was raised as to his citizenship in order to enter government land—that is in the townsite there; and it was examined and conceded by the attorneys on both sides that there was no question. He was all right and he might go on and enter. There was no further question raised and they were satisfied—the attorneys on both sides were—that he had a right to proceed.

Mr. WALLACE.—The defendant moves to strike out all of the answer after the words “and it was examined and conceded,” for the reason heretofore given in the preceding motions to strike as to similar testimony.

Q. Do you know of your own knowledge of *Lammlein* voting?

A. Only from words of his own and the neighbors of them both. I didn't see him vote myself.

Q. But he told you that he voted, did he?

A. That he voted. And always took an active part in politics when elections came. He took a very active part on his political side.

Mr. WALLACE.—It now appearing that the knowledge of the witness as to *Lammlein's* voting is

(Testimony of Nicholas Hilger.)

derived from his, *Lammlein's*, statements, or the statements of third persons, the defendant moves to strike out the statement of the witness that he had voted, and all his testimony concerning *Lammlein's* voting, on the ground that it is hearsay, and not within any exception permitting the introduction of hearsay evidence.

Q. What have you to say as to whether Mr. *Lammlein* was an active man in political affairs in Lewis and Clark County?

Mr. WALLACE.—Objected to as immaterial.

A. He was active when the elections came around. He would take an active part in discussing the matter and as to the candidates, and he was a strong Democrat and always worked in the interest of the Democratic candidates in the election.

Q. Do you know where he lived in Lewis and Clark County?

A. Yes, in the fall of '64 he went up Silver Creek in the forks about two or three miles below Marysville, where a number of the parties that came with us had taken up claims, mining claims, and he moved up there and built him a house and thought he would winter there, but subsequently, that same winter, he moved down into the town they called Silver City there. It was a town named Silver City. And he took up some land in the city there, in the townsite as we called it, and built a house there, and began to give meals and enlarged his building so that he kept kind of a hotel.

(Testimony of Nicholas Hilger.)

Q. Where did he go from there, Judge?

A. When he sold out, I heard that he had gone away, but years after I came up from below and come along there with my rig and I found him in the canyon. I found them where he was located below Wolf Creek in the Prickly Pear Canyon, and he showed me his house and his place and he wanted me to stay over night.

Q. Did you stay over night? A. I did.

Q. What have you to say as to what his improvements consisted of there?

A. He had a very good loghouse and several rooms in it, and some additional buildings back which he used as kind of a storeroom, and a stone bake oven was erected there to bake—bakers like—a regular oven, and then a stone building that was a little from the house against the bluff—built against the bluff. I don't know what he used it for, but it was a very neat little stone building that he put there. And then he had a stable. And the road ran along there, the regular Benton road as we called it, ran along and near the bluff, but his house was between the road and the bluff there. And he had a stable across the street, across the road. The stable and fence and his feed mainly was where he cultivated across the street. I should say, rather, on the east side of the street, between there and the creek.

Q. Did he have a cultivated field there?

A. He had a cultivated field and raised stuff there.

Q. Did you notice what he raised?

(Testimony of Nicholas Hilger.)

A. No, I did not. He had in his stable and barn there feed for the horses and so on, and I didn't notice otherwise.

Q. How many acres would you think that he had in his claim there at that time?

A. Well, there were in the field—I didn't take a close observation with any view to ascertaining closely as to the amount of ground, but I had an idea there were eight or more acres in the field in his fence.

Q. How much of the land that was not plowed was enclosed and claimed by him?

A. There was land I couldn't really see, but there was apparently fences farther out than where the land was fenced on the west side of the road for pasture; and fence on east side, and then the second time when I stopped there, some year or two afterward, they wanted me to go and see their field and so on, and showed me the clearing that he had cleared, and I noticed the clearing extended across the creek east here—across the creek some at the lower end.

Q. How much land would you think that he was claiming there altogether, pasture and all?

Mr. WALLACE.—Objected to as immaterial as to the land that he is claiming.

Mr. LOEB.—Or that he was located on.

Q. How much land would you say he was located on and claimed all together?

Mr. WALLACE.—Objected to as immaterial as involving land both located on and claimed by him.

(Testimony of Nicholas Hilger.)

Mr. LOEB.—You may answer now, Judge.

A. He spoke to me that on the west side of the road he had done fencing for the pasture from the hill around, and on the east side to some extent, too; that the fence enclosed land for pasture in addition to the farming land which they had there, but I didn't examine as to the extent nor the number of acres, and I didn't ask him.

Q. So that when you spoke of eight acres as being in that field you meant eight acres as cultivated, Judge?

Mr. WALLACE.—Moved to strike out the preceding answer on the ground that it is hearsay and not within any exception to the rule.

A. I wouldn't think that it was all cultivated. It was cultivated at the most advantageous part of it; some of it not cultivated, merely cleared out. There had been, apparently, timber there when I was through before.

Q. You don't want to have us understand that all the land that Mr. *Lammlein* had enclosed there was eight acres, do you?

A. Oh, he had more enclosed, but this was in the field particular.

Q. It was the cultivated portion?

A. It was the cultivated portion I spoke of; yes.

Cross-examination by Mr. WALLACE.

Q. Judge, when you referred to the proceedings as to the entry of the Silver townsite—

A. Yes.

(Testimony of Nicholas Hilger.)

Q. You referred to proceedings in the United States land office to make the entry in your name as probate judge, as decided under the federal law, or proceedings before you under the territorial laws as probate Judge, to determine occupancies or both.

A. It was mainly in regard to occupancy.

Q. Before you as probate Judge?

A. Before me as probate Judge.

Q. These proceedings, now, were had in your probate court, and in conformity with the then existing laws of that State on that subject?

A. Yes, sir.

Mr. WALLACE.—At this point the defendant moves to strike out all the testimony concerning the Silver City townsite entry contest proceedings, for the reason that they can be only evidenced under the law of the record of the proceedings themselves, and that this testimony is secondary evidence as to the same.

Q. Now, as to the voting, Judge. Do you know that, or is your knowledge as to *Lammlein's* voting derived from the talks that you had with him, or talks with other persons? A. Yes, from talks.

Q. You were never present when he did vote, then? A. No.

Q. And these talks would be ordinarily after election in speaking of the candidates he voted for?

A. Yes, and before election of what he was going to do.

Q. What he was going to do? A. Yes, sir.

(Testimony of Nicholas Hilger.)

Q. But you never had any talk with him immediately at the polls as he was about to cast his ballot? A. No, not at the polls; I wasn't there.

Mr. WALLACE.—The defendant renews its motion to strike out all testimony given by the witness as to *Lammlein's* voting, on the ground that the same is hearsay, and not within any exception permitting its use as evidence.

Q. As I understand you, Judge, you, on one of these occasions—probably the second one—when you came through the canyon and stopped at *Lammlein's* place, noticed that the clearing had extended across the creek to the west? A. No, the east.

Q. No, the east; I beg your pardon. Over toward the foothills on that side?

A. On the other side, yes.

Q. But you didn't know how far over that way it had extended, but you recall there was some clearing on the eastern side of the creek?

A. There was some across the creek that I noticed; there was some across the creek.

Redirect Examination by Mr. LOEB.

Q. Judge, these proceedings that were had before you as probate Judge, they were with reference to ascertaining whether or not *Lammlein* was a citizen, so that you might apply for a townsite entry in the land office, weren't they?

Mr. WALLACE.—The question is objected to as leading, and not redirect examination.

Mr. LOEB.—Now you may answer, Judge.

(Testimony of Nicholas Hilger.)

A. That was. First Mr. Brown claimed a quarter section there taking in the town of Silver, and there was a question raised, and these men objected, as it was the townsite, and Mr. *Lammlein* objected, and Mr. *Lammlein* contended that he had a former right ahead of Mr. Brown for the townsite so to be taken up, by one man, or claimed by one man, and then the different parties that were interested in the townsite, Mr. Green and the others—the matter was talked over, and they objected to Mr. Brown's entry, and they, among themselves, agreed that it should be entered as a townsite, and each man to get his share as he occupied, after the survey was made.

Mr. WALLACE.—Move to strike out all of the answer after the words "The matter was talked over" as hearsay and incompetent.

Q. It was really for the purpose of determining whether *Lammlein*, Brown and Green were qualified to enter ground as a townsite, that this hearing was had?

Mr. WALLACE.—Objected to as leading.

A. Yes.

Q. It was determined in that proceeding, was it, Judge, that Mr. *Lammlein* was a citizen of the United States?

Mr. WALLACE.—Object as not redirect examination, as leading and as incompetent and hearsay.

A. Yes; that he had a right to enter as a citizen and no further questions—it was admitted by both parties.

(Testimony of Nicholas Hilger.)

Q. And this determination was had consequent upon an agreement signed by all parties after the examination?

Mr. WALLACE.—Make the same objection as to the last preceding question. A. Yes, sir.

That is all.

NICHOLAS HILGER.

Subscribed and sworn to before me this 16th day of March, 1905.

HENRY N. BLAKE,
Examiner.

Mr. LOEB.—I would like to read the allegations of paragraphs twenty-one and twenty-two and see if they are admitted.

(Reads allegations of paragraphs twenty-one and twenty-two.)

Mr. BULLARD.—You may say that the allegations contained in paragraphs twenty-one and twenty-two of the bill of complaint are admitted.

Mr. LOEB.—This is as to the probate proceedings.

Mr. BULLARD.—Mr. Wallace, you have no objection, have you?

Mr. WALLACE.—No; none at all.

Mr. LOEB.—It is conceded by the defendant that the allegations of paragraphs twenty-one and twenty-two of the bill of complaint are true and that the said allegations may have the effect of proof in these proceedings.

J. R. WHITMIRE, a witness called in behalf of complainant, being sworn, testified as follows:

Direct Examination by Mr. LOEB.

Q. Mr. Whitmire, what is your full name?

A. J. R. Whitmire.

Q. Where do you live, Mr. Whitmire?

A. Helena.

Q. What official position do you hold in Lewis and Clark County?

A. Deputy in county clerk and recorder's office.

Q. I will ask you if you have ever seen this book before, and to whom, if anyone, you delivered it—Complainant's Exhibit "B"?

A. Yes, I have seen this before.

Q. To whom did you deliver this?

A. To Judge Eddy.

Q. Where did you get Complainant's Exhibit "B," where did you find it?

A. I found it in the vault where we keep these old records.

Q. In the vault of the courthouse, Lewis and Clark County, State of Montana? A. Yes, sir.

Q. Did you deliver to him in the said State as it is now, or has it been changed since you delivered it?

A. Well, to the best of my belief it is in the same condition as when I delivered it to him.

Q. And it was in your custody as an official of Lewis and Clark County, up to the time you delivered it to him? A. Yes, sir.

(Testimony of J. R. Whitmire.)

Q. You found it among the files, the official files of your office? A. Yes, sir.

Cross-examination by Mr. WALLACE.

Q. Mr. Whitmire, you didn't preserve a copy of that book before you turned it over to Judge Eddy, did you? A. No, sir.

Q. And you don't pretend to say that you have a mental photograph of each page in your mind as it was when you turned it over to Judge Eddy?

A. No.

Q. And you could not absolutely, because you have no copy against which to check it now, tell us that that book and its pages are in precisely the same condition that it was when you turned it over to him? A. It has that look.

Q. It has that look?

A. I looked over it with Judge Eddy.

Q. Then of course you must have some memory, some recollection in your mind, as to what was on those pages, if you are able to state that it is the same?

A. The only thing that I distinctly remember is the name, a certain name.

Q. Yes?

A. The name *Lammlein*; that is the name we were looking for, and the day and the year.

Q. How many pages in this book?

A. That I don't know.

Q. What is on the second page?

(Testimony of J. R. Whitmire.)

Mr. LOEB.—Let the record show that Mr. Wallace does not show the book to the witness; Mr. Wallace holds the book in his hand.

Q. What is on that page, writing or printing?

A. I should judge there is both.

Q. Tell us what it is?

A. I couldn't on the second page. My recollection is that we found what we were looking for on the first page.

Q. Well, tell us what is on the first page?

A. There is printing.

Q. No. Tell us what it is, give it to us.

A. I couldn't do that.

Q. Tell us what is on the fifteenth page?

A. I can't.

Q. You can't tell us anything that is in that book at all?

A. Nothing except the one name, *Lammlein*; that is the only name I looked for.

Redirect Examination by Mr. LOEB.

Q. You do remember, however, that you and Judge Eddy looked for the name of *Lammlein* on the poll-book of Wolf Creek precinct?

A. Yes, we were looking for that year and that name.

Q. That is at Cartersville precinct No. 20?

A. Yes.

Q. And you do remember that you found the name of *Lammlein* on the poll-book as having voted at Cartersville precinct No. 20, Lewis and Clark County, Montana, on the 6th day of November, 1888?

(Testimony of J. R. Whitmire.)

A. That is my recollection.

Q. And the name was there before you delivered the book to Judge Eddy after you took it out of your vault, was it? A. Yes, sir.

Q. I will ask you to examine page two of the book to which your attention was called, and to notice the thirteenth line of the first column. What name do you find there? A. Martin Lammlein.

Q. Was that the name you found there when the book was in your custody as deputy clerk and recorder of Lewis and Clark County?

A. Yes, sir; that was the name we were looking for.

Q. No change has been made as to that name—that name has not been put on that book since the book was taken out of your possession, has it?

A. No.

Q. It was there when the book was in your possession? A. I think so.

Q. Do you know so? A. Yes, sir, I know so.

Mr. LOEB.—Now, we desire to offer this book in evidence.

Mr. WALLACE.—To the offer of the book—

Mr. LOEB.—Just before I offer it, Mr. Wallace, I will call Judge Eddy.

That is all, Mr. Whitmire.

J. R. WHITMIRE.

Subscribed and sworn to before me this 11th day of April, 1905.

HENRY N. BLAKE,
Examiner.

JOHN W. EDDY recalled.

Direct Examination by Mr. LOEB.

Q. Judge Eddy, this is Complainant's Exhibit "B," and the testimony shows that you, in company with Mr. Whitmire, who last testified, got this book from the county clerk and recorder of Lewis and Clark County, Montana. I will ask you to examine page two of the book, and notice what name you find on the thirteenth line of the list of voters?

A. Martin *Lammlein*.

Q. When did you first see that name on that book?

A. When we were in the vault looking for it, looking for this book. We found the book and found the name in it.

Q. In what vault, and where?

A. In the courthouse of this county.

Q. And you found the name in the book in the vault when you were looking for it?

A. Yes, sir.

Q. Has any change been made in that book since it was in your possession?

A. No, sir.

Q. Is the book in the same condition now as when you got it from Mr. Whitmire?

A. Yes, sir.

Q. You have not written the name of Martin *Lammlein* in there?

A. No, sir.

Cross-examination by Mr. WALLACE.

Q. Judge Eddy, you are not now, and were not at the time you were looking for this book, and the time you received it from Mr. Whitmire, the county

(Testimony of John W. Eddy.)

clerk, a county officer of Lewis and Clark County, or any deputy of any county officer of Lewis and Clark County, Montana, are you? A. No, sir.

Q. When you took that book into your possession, you took it away from the county courthouse?

A. Yes, sir.

Q. And it was in your exclusive possession, and you were not accompanied by any county officer or deputy while you retained it in your possession?

A. No, sir. I got permission from Mr. Sidney Miller, who is himself the county clerk and recorder, and Mr. Whitmire went with me and we got the book.

Q. You were not made a deputy county recorder?

A. This book was given into my possession by the county clerk and recorder. That is all.

Q. And so you took it away with you?

A. Yes, sir.

Redirect Examination by Mr. LOEB.

Q. You took the book away with you for the purpose of showing the citizenship of Martin *Lammlein*, and that he voted at Cartersville precinct?

A. Yes, sir.

Mr. WALLACE.—Objected to as immaterial—the object of taking the book away.

Q. And your investigation as to whether *Lammlein* voted or not, and your searches made in Lewis and Clark County, and the records of the county recorder's office were made for the determination of the question as to whether *Lammlein* voted?

A. Yes, sir.

(Testimony of John W. Eddy.)

Mr. WALLACE.—Objected to as immaterial and leading.

Q. And the book was loaned to you, as I understand it, for the purpose of bringing it to this hearing and to use it as testimony in this proceeding?

Mr. WALLACE.—Objected to as leading and immaterial. A. Yes, sir.

Q. And it is now in the same condition as when it was delivered to you?

A. Yes, sir. It is the poll-book of that precinct.

Recross-examination by Mr. WALLACE.

Q. You say it is the poll-book of that precinct?

A. Yes.

Q. You were not at that precinct when that election took place? A. No, sir.

Q. You don't know of your own knowledge whether it is the poll-book of that precinct?

A. Yes, sir, I asked for that book and got it.

Q. You simply mean that you called for that poll-book and they handed it to you as what you called for?

A. Yes, sir, and I could see that I got it by the printing and the statement in the book.

Mr. LOEB.—We now desire to offer in evidence Complainant's Exhibit "B."

Mr. WALLACE.—It is objected to on the ground that the book is presented in this proceeding not in its proper custody, and the evidence discloses that it was taken away from the proper custodian under the law, and it stands in the attitude of a discredited

(Testimony of John W. Eddy.)

poll-book and ballot record and is therefore inadmissible.

The EXAMINER.—I would make a suggestion that if there is no further use for this book a stipulation be entered into by which it can be returned to the county clerk's office, and then it can be used from there.

Mr. LOEB.—Yes, or it can be copied into the record, or a portion of it.

Mr. WALLACE.—Anything you desire to arrange about that is acceptable to me.

The EXAMINER.—I do not wish to retain it in my custody.

That is all, Judge Eddy.

JOHN W. EDDY.

Subscribed and sworn to before me this 20th day of April, 1905.

HENRY N. BLAKE,
Examiner.

JOHN TRODRICK, a witness called in behalf of the complainant, being sworn, testified as follows:

Direct Examination by Mr. LOEB.

Q. What is your full name?

A. John Trodrick.

Q. How old are you?

A. Eighty-three past.

Q. Where do you live?

A. I live in Wolf Creek.

Q. Do you read or write the English language?

A. No, sir.

(Testimony of John Trodick.)

Q. Do you read or write any language?

A. No, sir.

Q. Did you know Martin *Lammlein*?

A. Yes, sir.

Q. Do you know whether he was a citizen of the United States or not?

A. Yes, sir.

Mr. WALLACE.—The same objection is interposed to all testimony from this witness as to the citizenship or qualification to any land of Martin *Lammlein* that has been heretofore interposed in the case of similar testimony offered to other witnesses; and it is understood if this is not correct, Mr. Loeb, checking it over, that these objections shall apply to all the testimony of this witness wherever applicable.

Mr. LOEB.—Certainly.

Q. Was he a citizen of the United States?

A. Sir?

Q. Was *Lammlein* a citizen of the United States?

A. Yes, sir, he was.

Q. Where did you say you lived now?

A. Wolf Creek.

Q. Is the present place where you live at on Wolf Creek the same place that *Lammlein* formerly lived at?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. How many acres have you got down at Wolf Creek?

A. One hundred and sixty.

Q. And where did you get these?

(Testimony of John Trodick.)

A. The one hundred and sixty acres is in the southeast quarter of section thirty-five, township fifteen north of four west.

Q. Do you know the corners of the ground?

A. Yes, sir.

Q. How did you find the corners of the ground?

A. Mr. Paul Bickell showed me the corners of the ground after the survey.

Q. Mr. Bickell is a surveyor, is he?

A. Yes, a surveyor.

Q. And this ground that he showed you, how was that described?

Mr. WALLACE.—Objected to as hearsay testimony, dependent upon the assertions and statements of Bickell, and therefore incompetent.

Mr. LOEB.—You can answer that question now.

A. It was on the southeast quarter of section thirty-five, fifteen north of four west.

Q. And this ground that you describe as being the southeast quarter of section thirty-five, township fifteen north of range four west—

A. Yes.

Q. Is that the ground that *Lammlein* used to have?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. How did you get this ground that you have just described by legal subdivisions; how did you get it?

(Testimony of John Trodick.)

A. I bought it from Martin *Lammlein*; after he died I bought it from Mrs. *Lammlein*.

Q. What year did you buy it from Mrs. *Lammlein*?

A. I believe it was in '89, the latter end of August '89. He died in August, and word was sent to me at the mill at Wolf Creek—I was working there—to go down that night and pay the money to Mrs. *Lammlein*.

Q. Did you immediately go there and live?

A. Yes, sir.

Q. And have you lived there ever since?

A. I have lived there ever since, me and my boy.

Q. Are you a citizen of the United States, Mr. *Trodick*?

A. Yes, sir.

Q. Do you know Mr. Albion McDonald, sitting there next to Mr. Wallace?

A. Yes, sir.

Q. How long have you known him?

A. Oh, I know him pretty near eighteen years.

Q. Eighteen years?

A. Yes, somewhere about that.

Q. Do you know whether he had notice of your claim on this land?

A. Yes, sir.

Q. When?

A. After I bought the claim from Mr. Houghton—he was the man that took the money—Mr. McDonald went and tried to get that claim back, buy the claim back.

Q. That is, you mean Mr. McDonald tried to buy *Lammlein's* improvements at the time you bought them?

(Testimony of John Trodick.)

Mr. WALLACE.—Objected to as leading.

A. Yes, sir. Mr. Houghton said he couldn't. He was cashier for Mrs. *Lammlein* and when old man *Lammlein* died he had control of the business—he was a clerk.

Q. And Mr. McDonald tried to buy that at the same time you did, did he?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. What have you to say as to whether, since the time that you say Mr. McDonald endeavored to buy the improvements from Mrs. *Lammlein*, as to whether McDonald has built any buildings on the premises.

A. Well, his father built a building there on the ground, a log building on the ground—that was old Mr. McDonald—and next to him was George Carter and P. Carter was helping him to build the building. And they cut my fences down, and broke the fences down, and they built right on the ground. There is the house there yet.

Cross-examination by Mr. WALLACE.

Q. Mr. *Trodick*, what is your son's name?

A. Charles *Trodick*.

Q. You say that he went to live with you on this ground in '89—your son?

A. He was living with me—he was only a kid, he lived with me all the while; I had no wife.

Q. Did you ever let him take and enter a part of the land in that bottom, in the creek bottom at that point?

(Testimony of John Trodick.)

Mr. LOEB.—We object to that as not proper cross-examination, and for the further reason that the best evidence as to any land having been entered is the records of the United States land office at Helena, Montana. A. No, I held it all myself.

Q. You have another son named Al. *Trodick*, haven't you? A. Yes, sir.

Q. You knew that he entered a part of that creek bottom there?

A. That is the land across from the depot, south from the depot.

Mr. LOEB.—We object to the question as not being proper cross-examination, and on the further ground that the records of the land office in Helena land district, Helena, Montana, are the best evidence as to the entry of any land within that district and as to who entered it.

By the WITNESS.—Yes, that was how far he took.

Q. You knew that Al. *Trodick* entered that land across south from the depot?

A. Yes, he took it from the surveyor.

Mr. LOEB.—We object further on the ground that it is immaterial as to the witness' knowledge as to whether anybody entered land south of the depot at Wolf Creek, provided it is no part of the southeast quarter of section thirty-five, township fifteen north of range four west, and on the further ground that the records of the land office of Helena land district

(Testimony of John Trodick.)

are the best evidence of the land that was entered, and as to the person who entered it.

Q. Al. *Trodick's* house is south of the depot, isn't it, and in the creek bottom at that point?

Mr. LOEB.—We object to this on the further ground that it is immaterial, for the reason that it is not shown that the ground upon which Al. *Trodick's* house is situated is on the southeast quarter of section thirty-five, township fifteen north, of range four west, and on the further ground that the records of the land office of Helena land district, Helena, Montana, are the best evidence of the entries of any land, and the best evidence as to the person who entered it.

A. Yes, sir.

Q. How long has he lived there, Al. *Trodick*?

Mr. LOEB.—We object to that as being immaterial, and not proper cross-examination, and for the other reasons given in the objection last above named.

A. He has lived there nine years since he came from the army.

Q. Are you a native-born citizen of the United States?

A. I am a French born, but I am a native since '72 in the United States; I am a citizen.

Q. Where did you take out your papers?

A. I took them out down in Chicago.

Q. In what court?

A. The court is there down on—I don't remember the street.

Mr. LOEB.—I will state for counsel's information that I have here a certified copy of his papers.

(Testimony of John Trodick.)

Mr. WALLACE.—Well, I won't bother, then, examining any more. It now appearing that the witness is a naturalized, and not a native-born, citizen, the defendant moves to strike out all his testimony as to citizenship on the ground that his testimony will be secondary evidence of that fact.

Q. You spoke of having bought the *Lammlein* improvements from Houghton? A. Yes, sir.

Q. What was his first name?

A. George Houghton.

Mr. LOEB.—We object to his answering the question because he does not state the witness' testimony correctly. The witness stated that Houghton acted as cashier for Mrs. *Lammlein*, and that he bought the *Lammlein* improvements through Houghton.

Q. Did you carry on your negotiations—your trading—with Houghton?

A. Yes, sir, I carried them on.

Q. This was after *Lammlein's* death or before?

A. After *Lammlein's* death.

Q. Were you present when McDonald was talking with Houghton?

A. No, sir, but Houghton told me when I come down the next day, Houghton told me.

Q. Houghton told you? A. Yes, sir.

Q. And that is all you know about it?

A. Yes, what he told me about it, but I know that McDonald put a notice right in the corner of the section house, and another notice further down, and a notice right on the hill of a placer mine, and that is where he has a building now.

(Testimony of John Trodick.)

Q. This notice you speak of was in writing?

A. It was a board.

Q. With writing on it?

A. With writing on it. That is McDonald claimed a placer mine.

Mr. WALLACE.—We move to strike out the testimony of the witness as to the notice, for the reason that it is secondary evidence, and also move to strike out the testimony that McDonald had tried to buy of Houghton, for the reason that the same is hearsay.

Q. You remember when Auchard surveyed the land down there? A. Surveyed the townsite?

Q. Yes. A. Yes, I remember it.

Q. Do you remember of his surveying the street line in that place where Wolf Creek is now?

A. Yes, I do.

Q. Isn't it a fact that you moved in your building up to that street line as established by Auchard after he established it?

A. I moved right out there; the street is out there.
(Witness indicates.)

Mr. LOEB.—Wait a minute. We object as not proper cross-examination, and immaterial and irrelevant.

By the WITNESS.—Yes, sir.

Q. You know Charles Forman? A. Yes, sir.

Q. You know the hotel that he put up on that ground? A. Yes, sir.

Q. When was it put up?

(Testimony of John Trodick.)

Mr. LOEB.—Objected to as immaterial, and not proper cross-examination.

A. About five years ago; four or five years ago.

Q. Put up by your consent, wasn't it?

A. No, sir.

Q. Didn't you lease to him the ground on which the hotel was built?

Mr. LOEB.—We object to this line of examination for the reason that it is incompetent, immaterial and irrelevant, and not proper cross-examination, and if anything, would be part of defendant's case.

A. No, sir, I didn't lease that ground.

Q. Didn't you collect rent from him, collect rent from Forman after he finished his hotel building, for the ground on which the hotel was, and didn't you give him written receipts for rent?

Mr. LOEB.—We object to this for the reason that it is not proper cross-examination, and is immaterial and irrelevant and not competent, and that, if anything, it would be a part of defendant's case.

A. No, sir.

Q. You know a man named Pritchard?

A. Dave Pritchard?

Q. Yes, sir. A. Yes, sir.

Q. Didn't you and Pritchard start a saloon business on this ground?

A. Yes, sir, on this ground where it is now; on my own ground.

Q. Wasn't it a part of this ground that you are claiming in this suit?

(Testimony of John Trodick.)

Mr. LOEB.—We object to this as being immaterial, irrelevant and incompetent, and not proper cross-examination.

A. No. What suit? That land where the saloon is on, is on the same place—on the same land as this is.

Q. That saloon business was carried on in a building, wasn't it? A. In a building, yes.

Mr. LOEB.—We object to this on the ground that it is immaterial, irrelevant and incompetent, and not proper cross-examination.

Q. Who put up the building?

A. I paid for it.

Mr. LOEB.—Same objection.

Q. You paid for building it?

A. Yes, sir.

Q. And then you and Pritchard started up a saloon business in the building?

Mr. LOEB.—Object to this for the reason that it is incompetent, irrelevant and immaterial, and not proper cross-examination. A. Yes, sir.

Q. Wasn't that building in which you are engaged in carrying on the saloon business, on the southeast quarter of section thirty-five?

Mr. LOEB.—We object to this for the reason—

A. It is on the southeast quarter. The building is there yet.

Mr. LOEB.—Irrelevant and incompetent and not proper cross-examination.

(Testimony of John Trodick.)

Q. Are you not now renting the same building for saloon purposes to Mark Bray for fifteen dollars a month?

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent, and not proper cross-examination. A. Yes, sir, I am.

Q. And isn't Mark Bray carrying on a saloon business in that building? A. Yes, sir.

Mr. LOEB.—We object for the reason that it is immaterial, irrelevant and incompetent, and not proper cross-examination.

Q. How long has Bray been carrying on the saloon business in that building under rental from you?

Mr. LOEB.—Same objection.

A. About three years.

Q. Have you not also built a public hall upon the same land, the southeast quarter of section thirty-five? A. Yes, sir.

Mr. LOEB.—Objected to as not being proper cross-examination, immaterial, irrelevant and incompetent.

Q. And hasn't that building been rented by you for the purposes of speaking and dancing?

Mr. LOEB.—Same objection. A. Yes, sir.

Q. Did you not make Mr. Auchard a money payment of sixty dollars, or some sum, in order to get an interest from Auchard in this land?

Mr. LOEB.—Objected to as not proper cross-examination, immaterial, irrelevant and incompetent,

(Testimony of John Trodick.)

and that the deed evidencing the transfer of any interest in the land would be the best evidence of any transfer from Auchard, inasmuch as it was asserted by the railroad company and by the Auchard estate that they have a deed from the railroad company and a patent from the United States to the railroad company, and the further ground that the receipt for any money so paid—the receipt of Auchard—would be the best evidence of any money being paid.

A. Auchard come there and he wanted to put me out of my saloon and everything else, and he claimed the same land where I was, and as he was that way, I said, "Mr. Auchard, will pay you for that land; you know the case is in the court; you kind of claim the ground and I claim the ground, and you come over here from a lawyer to tell me I had to remove it or pay," and I paid him then one hundred dollars, and I said, "I will give you this hundred dollars for the one hundred feet": and after a while he sold Mr. McDonald the land next to me for a dollar seventy-five a foot, and I got this land for a dollar, and he comes to me again afterwards he sold my land to Mr. McDonald, and pretended he made a mistake, and he comes to me afterward and wants me to give him the money back again. I said, "No, I paid you for it, and until the case come out I don't know whether it is yours or mine. You have got the money now and I have got the receipt from you," and I said, "Of course I won't change any more."

Mr. LOEB.—We move to strike out the answer of the witness on the further ground that it is shown by

(Testimony of John Trodick.)

the witness that he was purchasing his peace and attempting to compromise this litigation so far as it affected the lot in question on which the saloon building is situated, and that any other proceedings having to do with the matter of the compromise of this litigation is incompetent testimony.

Q. Where is that receipt that you say you took from Mr. Auchard?

A. Well, I have it at home.

Q. Will you produce it here?

A. Yes, I can produce it here, but I haven't it here with me; it is home.

Q. How long will it take you to get it here?

A. Well, I don't know; it would take time to go from here and get back again.

Mr. LOEB.—We will supply it later on if you want it—that is so far as I know, if it can be found. I didn't know anything about the receipt.

Mr. WALLACE.—Well, with that understanding we will let it go.

Q. Was there any other agreement or receipt between Auchard and yourself than that receipt?

A. No sir, that is all I have.

Q. Now, what date was that?

A. I couldn't remember now until I see the receipt.

Q. Do you remember the year?

A. Charlie, he was a grown-up kid, and I would say it was about six or seven years ago since that, as near as I could, but I couldn't exactly tell without the receipt.

(Testimony of John Trodick.)

Q. And the paper was correctly dated, wasn't it?
It was dated at the time it occurred?

A. Yes, Dave Auchard wrote it right on the bar.

Q. Auchard wrote it on the bar?

A. Yes, sir.

Mr. LOEB.—We object to this entire line of testimony, and move to strike out all the testimony that has anything to do with any payment of money by *Trodick* to Auchard, in settlement of this controversy, or the portion of it as affecting the saloon land, for the reason that the same were negotiations tending to effect a compromise, and that the witness was purchasing his peace from Auchard, and for that reason all testimony with reference to the payment of money to Auchard for the right to have a quiet possession of the saloon business during the time that this litigation was progressing is incompetent.

Q. You knew that Forman was putting up a hotel on that ground, didn't you?

Mr. LOEB.—Object as immaterial, incompetent and irrelevant, and not proper cross-examination.

A. Yes, sir, I remember when he put up that hotel there.

Q. You didn't object to his putting it there?

Mr. LOEB.—Objected to as immaterial, incompetent and irrelevant and not proper cross-examination.

A. I told him not to make no more improvements. I said, "I don't allow it," and he told me he says, "If you win the case, John," he says, "Mr. Auchard will pay for the expense." And then I says, "I shall ob-

(Testimony of John Trodick.)

ject." I didn't give him leave. I would advise him not to go to no more expense until you find out how the case goes on. I never gave him no leave to put it up.

Q. Who first put up the building?

A. What, the brick hotel?

Q. Yes.

Mr. LOEB.—Objected to for the reasons last given.

A. Forman put it up.

Q. Wasn't it a man named John Driscoll?

Mr. LOEB.—Objected to as not proper cross-examination, and the same as above.

A. I couldn't tell you. Forman was the man, but I couldn't tell you what.

Q. Did you or didn't you ever receive rent from Forman and give him receipts for money—rent?

Mr. LOEB.—Same objection.

A. No, sir, I never give him no receipt, but I made an agreement with Forman when he come there. He wanted to get a cabin to start a butcher-shop. He had a butcher-shop down where Mr. Flowenec land is, and was going to come up—wanted to come up—and he asked my leave to put a butcher-shop there, and there was no house or saloon in that neighborhood, and I said yes and made the agreement there—to put up a butcher-shop—a cabin—an agreement for five years.

Mr. LOEB.—Objected to on the further ground that the agreement to lease land longer than one year must be in writing, and the testimony as to any agreement longer than one year is incompetent, and on the fur-

(Testimony of John Trodick.)

ther ground that it is irrelevant and immaterial and not proper cross-examination, and for these reasons we move to strike out the testimony of the witness.

Q. Now, under that agreement with you, Forman put up the butcher-shop?

A. He put up the butcher-shop.

Q. And the cabin?

Mr. LOEB.—Same objection.

A. And the cabin.

Q. And he started the butcher business in that shop, didn't he?

A. Yes, sir.

Q. And the shop was on the southeast quarter that you have spoken of?

A. Yes, sir.

Q. Did you collect any rent from him?

Mr. LOEB.—Same objection.

A. No, sir, he used to plow for me and do work on the ground.

Q. That was the way he paid you, wasn't it?

A. Yes.

Mr. LOEB.—Same objection, and not proper cross-examination, incompetent, irrelevant and immaterial.

Q. Didn't you give and sign in the presence of Edward R. Billings, a notary public, and acknowledge to Charles Forman and George Forman, a lease in writing of part of this ground?

Mr. LOEB.—Objected to as not proper cross-examination, immaterial and irrelevant and incompetent, and on the further ground that the lease itself, if any exists, is the best evidence.

A. Yes, that is, parts of the ground.

(Testimony of John Trodick.)

Q. Isn't that the lease that you gave them? Look it over. (Hands paper to witness.)

A. I can't read. I know I give him a lease for five years—a lease for to build a cabin and a butcher-shop there until the land was surveyed. It was five years.

Q. And didn't you acknowledge that lease before Edward R. Billings?

Mr. LOEB.—Objected to for the reason that the certificate of acknowledgment itself is better evidence, and on the further ground that it is immaterial, irrelevant and incompetent and not proper cross-examination, and that the lease itself is the best evidence, and that the notary who took the acknowledgment is the person who should certify to the acknowledgment, inasmuch as the witness states he cannot read or write and doesn't know whether he signed it or not. A. Yes, sir.

Q. How did you sign that lease?

Mr. LOEB.—Objected to for the reason that it is incompetent, immaterial and irrelevant, and not proper cross-examination; and for the further reason that the lease is the best evidence as to how he signed it, and the witnesses to the lease are the best evidence of his signature.

A. I couldn't sign it. It was just witnessed.

Q. Did you make your mark?

Mr. LOEB.—Objected to for the reason that the lease itself is the best evidence; and also for the same reasons above stated. A. Yes, I believe I did.

(Testimony of John Trodick.)

Q. It was on the ground described in that least that Forman put up the butcher-shop and cabin, wasn't it?

A. Yes. The butcher-shop is there yet.

Q. Now do you know Bill Reinig?

Mr. LOEB.—Objected to for the same reasons—not proper cross-examination, immaterial, incompetent and irrelevant.

A. Yes, sir.

Q. You knew Arthur & Burns?

Mr. LOEB.—Same objection.

A. Yes, sir.

Q. You know where the store building is?

Mr. LOEB.—Same objection.

A. Yes, sir.

Q. That is occupied now by Arthur & Burns?

A. Yes, sir.

Mr. LOEB.—If it is to be understood that this objection goes to all this line of proof it will save time.

Mr. WALLACE.—Yes, we are quite willing to do that.

Mr. LOEB.—It is understood that all testimony of this witness now being questioned under cross-examination by Mr. Wallace, is objected to for the reason that it is not proper cross-examination, incompetent, irrelevant and immaterial.

Q. That store building is on the southeast quarter of this section thirty-five, isn't it?

A. Yes, sir.

Q. You knew when it was put up?

A. Yes, sir.

Q. You didn't object to its being built, did you?

A. They bought the ground from Auchard.

(Testimony of John Trodick.)

Q. You didn't object to its being built, did you?

A. I objected to their building any building there at all.

Q. To whom did you make that objection?

A. To all of them, but they laughed at me.

Q. Well, what person did you talk to?

A. I talked to—first I talked to McDonald. He wanted to put a building down there.

Q. Never mind McDonald. I am talking about the store building down there, Bill *Reining's* store.

A. Bill Reinig built that. I didn't make no objection because he bought the improvements from Charlie Forman.

Q. You didn't make any objection to that?

A. No, I could not.

Q. That Bill *Reining* store was put up on the land covered by this lease?

A. Yes, Charles Forman claimed it, I believe.

Q. How far is it from the Arthur & Burns' store to the Forman hotel? A. Where the store is?

Q. Yes. How far apart are they?

A. From the hotel?

Q. Yes.

A. Well, as near as I could guess they would be about one hundred feet; might be less or more, about that.

Q. Is that hotel on the ground described in the lease? A. Yes, on the same ground.

Q. On the same ground?

A. Southeast corner—quarter.

(Testimony of John Trodick.)

Q. You know the building that was called the Reinig building?

A. Yes, that is farther down.

Q. Built by McDonald? A. Yes, sir.

Q. Did you object to that building being put up?

A. Yes, sir, I did.

Q. To whom? A. McDonald.

Q. Do you know the Bissonnette blacksmith-shop?

A. Yes, sir.

Q. Do you know when that was put up?

A. That was put up—yes, I know when it was put up.

Q. It was put up on the southeast quarter of thirty-five, wasn't it?

A. Yes, on the southeast quarter.

Q. Who put it up?

A. A fellow named—I forget now the name. The blacksmith was there but I forgot his name.

Q. Did you object to that building being put up?

A. Yes, I did object to it, but they said they have got as much right as anybody else.

Q. Was this before the building was begun?

A. Yes, before the building was begun.

Q. You never took any steps to get that man off or that building off, did you?

A. No, I could not because they all took advantage of me in that particular.

Q. And the building has been there how long?

A. I would say the building has been there about six or seven years, I believe, as near as I could know. I couldn't exactly tell the year.

(Testimony of John Trodick.)

Q. I want to ask you again whether you did not ever sign any receipts to Mr. Forman—

A. No, sir.

Q. —for money paid you by him.

A. He never paid me money, but I took payment on work and plowing.

Q. Did you give him receipts?

A. No, I never gave him any.

Q. Never gave him any receipts?

A. No, sir.

Q. Sure of that?

A. Sure of it. He paid me by plowing.

Redirect Examination by Mr. LOEB.

Q. You spoke of Houghton. Now, did you buy these improvements himself or from Mrs. *Lammlein* or from Houghton?

A. I bought from Mrs. *Lammlein*.

Q. What did Houghton have to do with it?

A. She appointed him. He was appointed, and asked me to get the money, and as I could not pay it all at once I promised to pay in installments. He was appointed clerk to take the money for Mrs. *Lammlein*, and she went away with her niece.

Q. Houghton, then, didn't have anything to do with the ownership of the improvements at all?

Mr. WALLACE.—Objected to as leading.

A. Oh no.

Q. And who did you say that you purchased them from? A. What?

Q. I say, who was it you purchased the *Lammlein* improvements from?

(Testimony of John Trodick.)

A. I purchased them from him before he died, and when he was sick. And then I was working at the mill at Wolf Creek, and when he died—he died Sunday—and I got word when he died when I went to the mill again. Mrs. *Lammlein*—the widow woman, the old woman—she got George Houghton to collect the money for the improvements, and sent word to me then to come down sure because Mrs. *Lammlein* was going away with her niece, and so I could take the key from him and pay the cash money I could to here—I paid sixty dollars in cash and the rest by installments.

Q. Then it was before the death of *Lammlein* that you purchased the improvements from *Lammlein* himself?

Mr. WALLACE.—Objected to as leading.

A. Yes, from *Lammlein* himself.

Q. Where was *Lammlein* when you purchased the improvements from him?

A. In the house. We were talking; he was sick.

Q. The same house that you are living in now?

A. Yes, the house I am living in now.

Q. And what land did *Lammlein* sell you, and improvements—what right?

Mr. WALLACE.—Objected to as assuming a fact not in evidence, viz: the purchase of the land as distinguished from the improvements.

A. Southeast quarter of section thirty-five, fifteen north of four west.

Q. Now, was there any of these persons whose names Mr. Wallace has called your attention to, and

(Testimony of John Trodick.)

who have erected buildings on the southeast quarter of section thirty-five, township fifteen north of range four west—were any of those persons on the land when you purchased the improvements from *Lammlein*? A. No, sir.

Q. Were any of those persons on the land when you settled upon the land? A. No, sir.

Q. And were all the buildings to which Mr. Wallace called your attention in cross-examination—were all these buildings erected after you purchased the improvements from *Lammlein*, and after you settled on the land?

A. I was settled on the land when the first improvements were made.

Q. Well, all of these buildings to which Mr. Wallace called your attention have been erected on the southeast quarter of section thirty-five, township fifteen north, range four west—they were all erected and put upon the land that you purchased—the improvements on which you purchased of *Lammlein*, after you settled on the land? A. Yes, sir.

Q. Did you ever have any talk with Auchard, in which Auchard asked you to withdraw your suit or your application to enter this land, and what did he say?

Mr. WALLACE.—Objected to as not redirect examination, and leading.

A. Yes, I had a conversation with him.

Q. What did he say?

Mr. WALLACE.—Same objection.

(Testimony of John Trodick.)

A. He wanted to give me a deed for the ground I bought and I objected. I said no. I said, "I don't take no deed. My case is in the court and I can't take no deed without I got the right owner"; and he says, "Well," he says, "the case is mine." I says, "Mr. Auchard, I have no poof to see it yet, and I will wait and see what it is, and I am going to write my lawyer," and I wrote and mentioned certain lawyers, and I said, "He mentions some lawyers," and *and* he says, "No, don't mention such and such a lawyer." And he told me he was the man who was working the case, and wasn't my own lawyer. It was Mr. Reece who was working the case. He was working the case. I says, "I am going to write my lawyer and I am going to mention it to him," and he says, "Don't mention that name to him"; and I thought directly that I was sold, there and then.

Q. When was this, Mr. *Trodick*?

A. About seven years ago—about a month before he took sick, before Dave took sick. He says he would give me a deed to the land, and I says, "I don't want no deed until I get the right," and I says, "I am not done with it yet."

Q. Did I understand you to say that he wanted you to withdraw your case and he would give you a deed for the property?

Mr. WALLACE.—Objected to as leading and not redirect examination.

A. Yes, but would not have anything at all to do with him.

(Testimony of John Trodick.)

Q. You said, in answer to a question by Mr. Wallace, that you were a naturalized citizen—that you took the papers out? A. Yes.

Q. Where did you take the papers out?

A. In Chicago.

Q. When did you take them out in Chicago?

A. '72 it was that I took them out in Chicago.

Q. Did you try to get a copy of those papers?

A. I have a copy here now in this land office.

Q. You have a copy in the land office?

A. Yes, sir. I had to swear my paper in.

Q. Was it a copy of the Chicago papers, or a copy of the papers you afterwards took out in Lewis and Clark County?

A. The paper in the office went to Chicago where I got my papers there; the place was burned down and I transferred them and I got my paper here again.

Q. That is, as I understand it, your original papers were burned at Chicago?

Mr. WALLACE.—Objected to as leading.

A. Yes, and I transferred here and I took them out here about twelve or thirteen years ago.

Q. You got other papers here?

A. Yes, my papers here in Helena.

The EXAMINER.—We will now take a recess until two o'clock this afternoon.

(Hearing resumed.)

Q. Mr. *Trodick*, did you enter the southeast quarter of section thirty-five in township fifteen

(Testimony of John Trodick.)

north of range four west, containing one hundred and sixty acres of land, as a homestead?

A. Yes, sir.

Q. In Helena land office, Helena, Montana.

A. Yes.

Mr. WALLACE.—Object to that question on the ground that the records are the conclusive evidence of that fact.

Q. You said in your bill of complaint that you are willing to pay to the railway company or to the government, whatever amount of money is necessary to secure the title to this land?

A. Yes, sir.

Q. Or their proportion of the expense?

A. Yes, sir.

Q. Do you still stand ready and willing to pay that?

A. Yes, sir.

Q. You don't know how much that will be, do you?

A. No, sir.

Q. And it is only because you do not know what the amount will be that you do not make a tender of the amount?

Mr. WALLACE.—Objected to as leading.

A. What?

Q. Why is it, Mr. *Trodick*, that you do not have the money here on hand—you say you are willing to pay that money?

A. Why, I am willing to pay it at any time they want it.

Q. Do you know how much it is?

A. No, I don't.

(Testimony of John Trodick.)

Q. Is that the reason why you don't bring it here and offer to pay it?

A. Yes, I want to know beforehand.

Q. But you are willing to pay whatever amount it is, are you?

A. Yes, I am willing to pay whatever amount it is.

Q. When did you first go on this land known as the southeast quarter of section thirty-five, township fifteen north of range four west?

A. When I went on first?

Q. Yes.

A. Went on about the last end of August, 1889.

Q. And have you lived there continuously?

A. Yes, sir.

Mr. WALLACE.—Objected to as leading.

Q. And without interruption ever since?

A. I have lived there all the time when I went to work to make a living, and my boy was on the ground at the same time.

Q. So that since '89 you have lived on the place?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir; never two weeks away from it.

Recross-examination by Mr. WALLACE.

Q. Mr. *Trodick*, was the land surveyed when you made the trade with Houghton?

A. No, it was not surveyed.

Mr. LOEB.—We object to the question on the ground that there was no trade made with Houghton, and because it assumes a state of facts that did not exist according to the testimony in the case.

(Testimony of John Trodiek.)

Q. How did you know the precise boundaries of the land of *Lammlein*?

A. There was a surveyor there and I asked him to measure the land.

Q. When was that? A. In '89.

Q. At about the time you went on the land?

A. When I went on the land, about a week after I got there Bickell was there, and I took him to show me the marks of the land—show me the corners.

Q. What kind of corners were shown you then?

A. Well, he showed me the mark of the eastern corner. The mark is there yet—where the ground come to.

Q. You mean the government corners?

A. No, where he surveyed it—the hundred and sixty acres.

Q. Where the government had surveyed?

A. No, the government didn't survey anything.

Q. This was a private survey?

A. Yes, a private survey. Paul Bickell wasn't sure if it was marked right or not.

Q. This is the same person that you spoke of in your testimony this morning, and the same thing that Bickell showed you? A. Yes, sir.

Mr. WALLACE.—Move to strike out this testimony about Bickell and what he showed him upon the ground that it is hearsay.

Q. Now, did you buy at that time the improvements alone? A. From *Lammlein*?

Q. Yes.

A. I bought his right *ad* the improvements.

(Testimony of John Trodick.)

Q. His right and improvements? A. Yes.

Q. Did you make any payment to *Lammlein* before he died? A. Not before he died.

Q. No?

A. When he died and his wife she gone away, I paid sixty dollars in cash and the rest I paid in installments.

Q. Did you have any writing with *Lammlein* of any kind while he was living? A. Writing?

Q. Yes. A. No.

Q. Any writing? A. No.

Q. You didn't pay anything under the arrangement until after *Lammlein* died?

A. Until after *Lammlein* died. His wife was there when the agreement was made.

Redirect Examination by Mr. LOEB.

Q. Before *Lammlein's* death he had agreed to sell you the right and the improvements?

Mr. WALLACE.—Objected to as leading.

A. Yes.

Q. And the money you paid to Mrs. *Lammlein*, was that paid in consequence of the arrangement that you had made with *Lammlein* before his death?

Mr. WALLACE.—Objected to as leading.

A. Yes, the agreement made when he was sick, to pay the money. And he chose George Houghton to be clerk for his wife. He said, "When I die, you pay the money to my wife," before Mrs. *Lammlein*, and George Houghton was there present too.

Q. Who was there present?

(Testimony of John Trodick.)

A. George Houghton; he was the man that collected the money, and I paid him sixty dollars when she left there, and the rest I paid in installments.

Q. Was this conversation had with *Lammlein* at *Lammlein's* house when Mrs. *Lammlein* was present?

A. Yes, she was there.

Q. And who told you to pay to Mrs. *Lammlein*?

A. Well, that was the agreement that was made.

Q. But who told you, *Lammlein*?

Mr. WALLACE.—Objected to as leading.

A. Yes, before old man *Lammlein* died. He said "My wife shall take the money." And George Houghton was the man *Lammlein* wanted to take charge to see that the money was paid.

Q. Now, you spoke of Mr. Bickell showing you some survey corners. Now, didn't he also show you in 1891, after the land had been surveyed by the government, where the corners were so that you could file your application to enter land as a homestead?

Mr. WALLACE.—Objected to as leading and not redirect examination.

A. Yes, he showed me where the corner of the section was—he was then surveying the government land, surveying right there. And he asked me to come and see the place where *Lammlein* ground was, and he showed me the ground and the corner—the eastern corner mark and the western one.

Q. And this was in 1891, after the land was surveyed?

Mr. WALLACE.—Objected to as leading, and not redirect.

(Testimony of John Trodick.)

A. They was surveying it then.

Q. When you say it was surveyed, do you mean it was surveyed by the government then?

A. I don't know; I guess so. Paul Bickell he was the surveyor, the government surveyor.

That is all.

Mr. WALLACE.—Moved to strike out all testimony as to what Paul Bickell said and showed the witness, as hearsay.

Mr. LOEB.—Just one more question.

Q. The land that Paul Bickell showed you the corners of, was that the same land you bought of *Lammlein*?

Mr. WALLACE.—Objected to as leading and not redirect examination, and repetition.

A. Yes, sir.

That is all.

His

JOHN X TRODRICK.

Mark

Subscribed and sworn to before me this 20 day of February, 1905.

HENRY N. BLAKE,

Examiner.

CHARLES WORTH recalled:

Direct Examination by Mr. LOEB.

Q. I understood yesterday from you that you were there when Mr. *Lammlein* went there in 1875 or 1876 to Wolf Creek? A. Yes.

Q. Do you know what year it was that he went there? A. Well, he started in '75.

(Testimony of Charles Worth.)

Q. Now, where did *Lammlein* live from '75 to 1889? A. He lived at Wolf Creek.

Q. Did he live on the same land that he lived on in '75?

Mr. WALLACE.—Objected to as leading.

A. He lived on the same land after he had that first cabin. Mind you, he had a little shack right on top which stands there to this day—it stands there on the bank—and he right in under the bank.

Q. What have you to say as to whether the land that he lived on was the same land that *Trodrick* now lives on?

A. It is the same land except what is washed out—washed away.

Q. Now, you say he lived there all the time from '75 to '89?

A. He lived there all of the time until he took him out of there a corpse.

Q. Was he living there on July 6th, 1892?

A. He did not; he was dead.

Q. You drew a plat for us yesterday, Plaintiff's Exhibit "C," to which I call your attention now. Did you mark a number of houses on that plat?

A. Yes.

Q. I want to ask you, Mr. Worth, when *Trodrick* went there were any of these houses that you marked on the plat built? A. No, sir.

Q. All of these houses that are marked on the plat, Plaintiff's Exhibit "C," were put there since?

A. Since Mr. *Trodrick* took possession of that land, and since he took them old buildings from Mr.

(Testimony of Charles Worth.)

Lammlein. The old house that *Lammlein* lived in, and the old stable.

Cross-examination by Mr. WALLACE.

Q. Do you see *Lammlein's* house on the map, Mr. Worth?

A. Why it has a garden right in front of it.

Q. Marked A, is it not?

A. Well, I don't know what that letter is, A-B or something.

Q. Was that house there when *Trodick* took possession?

A. Yes, sir.

Q. Well, one of the houses was there, then, when *Trodick* took possession?

A. They built an addition to the house and *Trodick* took possession of it.

Q. Was the stable of *Lammlein's* there?

A. Yes, sir, right here.

Q. F, isn't it?

A. Yes, right here; it stands to this day yet.

Q. Now, was there any other building of *Lammlein's* there?

A. No, sir, no other buildings.

Q. He didn't have any stone building in the bank?

A. That is included in this building here, Mr. Wallace.

Q. It is all a part of A?

A. Yes, it is under one roof.

Redirect Examination by Mr. LOEB.

Q. So, with the exception of the buildings marked A and F, there was no building, either of *Lammlein's*

(Testimony of Charles Worth.)

or others, on the land when *Trodrick* took possession of it? A. No, sir, that is all.

CHARLES WORTH.

Subscribed and sworn to before me this tenth day of March, 1905.

HENRY N. BLAKE,
Examiner.

Mr. LOEB.—I have here the citizenship papers of Mr. *Trodrick* that I desire to offer in evidence.

Mr. WALLACE.—Kindly let me see them.

The EXAMINER.—These will be marked Plaintiff's Exhibit "D."

Mr. WALLACE.—Objected to because the certificate is not in compliance with the federal statute regulating the use of documentary evidence.

Mr. LOEB.—We will ask to have it marked and now it is offered in evidence.

Now, may it please the Court, I desire to offer in evidence the certificate of the general land office certifying that the annexed copies are papers filed in the case of the Northern Pacific Railway Company against *Trodrick*, and are true exemplifications of the originals in the office.

Mr. WALLACE.—Objected to as irrelevant and immaterial, and further because the patent is conclusive evidence for the purposes of this action upon all matters referred to in the offered exhibit.

The EXAMINER.—This will be marked Complainant's Exhibit "E."

(Testimony of Charles Worth.)

Mr. WALLACE.—Then make the record show that the Complainant Exhibit "E" is objected to for the reason just given.

Mr. LOEB.—Now, I desire to offer in evidence a certified copy of a deed dated July 31st, 1886, between Martin *Lammlein* and Kathrin *Lammlein*, of Cartersville, parties of the first part, and the Montana Central Railroad Company. It is deed counsel called for in the examination of Judge Eddy.

The EXAMINER.—That is marked Exhibit "F."

Mr. WALLACE.—No special objection to this.

The EXAMINER.—Perhaps it would be well for me to identify Defendants' Exhibit 1.

Mr. BULLARD.—Yes, but we will not bother to introduce it in evidence now.

The EXAMINER.—Where there is a reference to the lease you can say it was marked by the examiner Defendant's Exhibit 1.

FRANK D. MIRACLE recalled.

Direct Examination by Mr. LOEB.

Q. I asked you yesterday to identify a certain letter from Binger Hermann to the register and receiver at Helena, Montana, dated December 24th, 1898. An objection was made to the introduction of the original letter in evidence. I will ask you whether that paper you now have in your hand is the original letter that you had in your hand yesterday? A. It is.

Q. Will you read the contents of that letter?

(Testimony of Frank D. Miracle.)

Mr. WALLACE.—We object to that for the same reason that we objected to the introduction of the original letter. What is the object of reading it into the record?

Mr. LOEB.—Yes.

Mr. WALLACE.—It may be considered read in evidence. It was admitted yesterday over my objection.

Q. That is the letter, Mr. Miracle, which you have read into the record—that is the letter received in your office in the official correspondence of the office.

A. It comes to me in the official correspondence of the office. That is, I receipted for and received it from the former register as a part of the records of the land office.

Mr. LOEB.—We understand, of course, that the letter and all the endorsements are to be copied into the record.

Mr. WALLACE.—Anything you want will be copied into the record.

Q. Mr. Miracle, I will ask you whether, at my request, you made an examination to ascertain as to whether the southeast quarter of section thirty-five, township fifteen north of range four west, principal meridian of Montana, was within forty miles of the line of the Northern Pacific Railroad as definitely located July 2d, 1882?

Mr. WALLACE.—That is admitted, Mr. Loeb. You alleged it was within the forty-mile limit of the general route. We have not denied that. We admit

(Testimony of Frank D. Miracle.)

it is within the forty-mile limit of the line of definite location.

Mr. LOEB.—You may as well let him answer the question. Did you make the examination?

A. Yes, sir.

Q. And did you find it is within the forty-mile limit? A. Yes, as shown by our records.

Q. You mean the records of the land office at Helena, Montana?

A. Yes, the records of the land office at Helena, Montana.

Mr. LOEB.—We now desire to offer in evidence a certified copy of that same letter from Binger Hermann.

Mr. WALLACE.—Objected to for the reason that it is not certified to as required by law, and for each and all of the reasons urged as objections to the admissibility of the original letter.

The EXAMINER.—This letter I will mark Complainant's Exhibit "G."

Q. This letter of which Exhibit "G"—Complainant's Exhibit "G"—is a certified copy, was it compared by you with the original? A. Yes, sir.

Q. Well, does this constitute an official notification to your office of the judgment in the case of *John Trodick* versus the Northern Pacific Railroad Company?

Mr. WALLACE.—Objected to as leading, and as calling for an interpretation of the document by the witness.

(Testimony of Frank D. Miracle.)

A. Why it is not a judgment; it is a decision of the commission.

Q. And is it the decision of the commissioner in the case of John *Trodrick* versus Northern Pacific Railway Company, involving the southeast quarter of section thirty-five, township fifteen north of range four west?

Mr. WALLACE.—Same objection.

A. Yes, sir.

Q. Is the method followed by Mr. Hermann, the commissioner, in notifying your office of the decision in this case, the same method as the usual method in similar cases?

Mr. WALLACE.—Objected to on the ground that the witness is not qualified to testify to the methods of Mr. Binger Hermann, and as being incompetent.

A. It is.

Q. Well, it is the only custom or method that is in vogue in the land department, isn't it?

Mr. WALLACE.—Same objection.

A. It is the method in which we receive notice of the decisions of the commissioner.

FRANK D. MIRACLE.

Subscribed and sworn to before me this 25th day of March, 1905.

HENRY N. BLAKE,

Examiner.

The EXAMINER.—Is that all the testimony?

Mr. LOEB.—That is practically all the testimony we have to-day, and, with the understanding that we

reserve the right to introduce further testimony, we will rest now.

Mr. WALLACE.—If you take any further testimony—if you should find anything you want to clear up, you will take it, of course, before we begin.

The MASTER.—The hearing will stand adjourned, subject to agreement of the parties, until the 12th of January at 10 o'clock A. M.

HENRY N. BLAKE,

Examiner.

Exhibit: Letter from Binger Hermann to Register and Receiver U. S. Land Office, Dated Dec. 24, 1898.

(Copy of letter from Binger Hermann to Register and Receiver U. S. Land Office, Helena, Montana, considered to have been read in evidence.)

“12-11263

W. R. J.

DEPARTMENT OF THE INTERIOR,

United States Land Office,

Washington, D. C., Dec. 24, 1898.

Register and Receiver,

Helena, Montana.

Sir: I have considered the case of *John Trodick vs. Northern Pacific R. R. Co.* involving the SE¹/₄, Sec. 35, Tp. 15 N., R. 4 W., situated within the primary limits of the grant to the company, the right of which attached July 6, 1882, when the map of the definite location of its road was filed.

The plat of survey embracing the land was filed in the local office August 10, 1891, and the tract was

listed by the company September 21, 1892, per list No. 215.

The records of this office show no pre-existing adverse claims to the same.

Mr. *Trodrick* applied to make homestead entry for the land January 10, 1896, and being refused he appealed to this office, which affirmed your action May 26, 1896, without prejudice to his right to apply for a hearing to determine the status of the land July 6, 1882, when the right of the company became effective.

He applied for a hearing August 10, 1896, whereupon notice issued citing the parties in interest to appear at your office September 21, 1896. The hearing was continued from time to time until April 16, 1897, when both parties were represented.

It appears from the evidence adduced that one Martin Lemline established his residence on the land, with his family, in 1877, continued to reside there until his death, some time in 1891, and his improvements on the premises were of the estimated value of \$1,000.

Mr. *Trodrick* settled on the land in 1891, and since then has continuously resided there.

The material question for determination in this case is this: Did the settlement claim of Mr. Lemline except the land from the operation of the grant to the company?

It is undoubtedly true that the land was occupied by Mr. Lemline when the right of the company at-

tached, that he was qualified to make entry of the same and settled there with the intention of doing so, as the circumstances indicate. Had he lived until the plat of survey was filed in your office, he or his wife would, without doubt, have been allowed to perfect the claim by them initiated prior to July 6, 1882.

Since Mr. Lemline had no claim of record, and the claim of *Trodrick* had its inception subsequent to the definite location of the road, it must be held that the land inured to the grant (*N. P. R. R. Co. v. Colburn*, 164 U. S. 537).

Your action is therefore approved and the application of *Trodrick* is accordingly rejected, subject to the usual right of appeal within sixty days. You will advise him of this action, and make prompt report at the expiration of the appeal period.

The company will be notified from this office.

Very respectfully,

BENJ. HERMANN,

JTA.

Commissioner.

[Endorsements]: 9825. F. Dec. 24, 1898. *John Trodrick vs. N. P. R. R. Co.* Affirms Decision of this Office Rejecting H. E. Application. Dec. 29/98. F. L. Reece, Notified. Report, Mch. 11/99. Mch. 7, 1899. Appeal Transmitted. Finis.

Stipulation Relative to Taking of Testimony.

Mr. LOEB.—It is hereby stipulated, by and between counsel for complainant and counsel for defendants, that

Whereas, the Honorable Henry N. Blake has been heretofore appointed Commissioner of the Supreme Court of the State of Montana and is unable by reason of the duties in said office to continue to act as Examiner in the above-entitled action:

Now, therefore, it is hereby agreed that the testimony be taken before the Honorable A. K. Barbour, Examiner, appointed for that purpose by the Honorable Wm. H. Hunt, Judge of the Circuit and District Court of the United States; and that said testimony be taken at the office of said Barbour, at Room 6, Granite Block, Helena, Montana, on January 12th, 1905, at ten o'clock A. M., at which time and place counsel appeared and the following testimony was taken; and when testimony is taken, the same, together with the testimony taken before the Honorable Henry N. Blake, Examiner, shall constitute the testimony in said cause.

Is that acceptable to you, Mr. Wallace?

Mr. WALLACE.—Yes, sir.

The EXAMINER.—I hereby certify that the foregoing stipulation was entered into by and between the parties by their respective counsel, on this 12th day of January, 1905.

ASHBURN K. BARBOUR,
Special Examiner.

Mr. LOEB.—We will now call Mr. Bickell; and we wish also to ask a few more questions of Mr. Trodick, when we shall have finished with Mr. Bickell. Mr. Bickell, will you be sworn, please?

PAUL S. A. BICKELL, sworn, testified as follows:

Q. Mr. Bickell, what is your full name?

A. Paul S. A. Bickell.

Q. How long have you resided, Mr. Bickell, in the State of Montana? A. Since '81.

Q. What business or profession do you follow for a livelihood? A. Surveyor and engineer.

Q. What schools were you graduated from?

Mr. WALLACE.—To shorten that, we will admit that he is qualified and that he is a competent civil engineer.

Mr. LOEB.—All right.

Q. How long have you been acting as engineer? In Montana? A. Since '81,

Q. What official positions have you held in Montana?

A. Was Deputy United States Surveyor—Mineral Surveyor and County Surveyor and State Engineer.

Q. Do you know the land in the vicinity of what is now Wolf Creek, Montana? A. Yes, sir.

Q. Did you know Martin *Lammlein* in his lifetime? A. Yes, sir.

Q. When did you first know *Lammlein*?

A. In '83.

Q. Where did you know *Lammlein*?

A. At Wolf Creek.

Q. What was he doing at Wolf Creek when you first knew him?

(Testimony of Paul S. A. Bickell.)

A. He was living there and gardening—had a small garden.

Q. Do you know the land at or near Wolf Creek, on which *Lammelein* was located? A. Yes, sir.

Q. Do you know John Trodick?

A. Yes, sir.

Q. Do you know the land that Trodick is now located on? A. Yes, sir.

Q. What have you to say as to whether the land that *Lammlein* was located on and the land that Trodick is located on was the same land?

Mr. WALLACE.—The question is objected to as immaterial and unavailing for the purpose of any relief sought by the plaintiff in this action.

A. I would say it was the same.

Q. Did you ever make any surveys for the Government on land at or near Wolf Creek?

A. Yes, sir.

Q. What land?

A. The township that Mr. Trodick lives on.

Q. You surveyed then for the Government of the United States the township that Mr. Trodick lives in? A. Yes, sir.

Q. Do you know where the southeast quarter of section No. 35, township 15, north of range 4 west, Helena Land District is?

A. 15—4—yes, sir.

Q. What have you to say as to where Trodick's location is with reference to that legal subdivision?

A. I would say it is in the southeast part of 35.

(Testimony of Paul S. A. Bickell.)

Q. And when you ran these surveys was Trodick living there? A. Yes, sir.

Q. You made the official survey of that township for the Government, did you? A. Yes, sir.

Q. Do you remember the year in which it was made?

Mr. WALLACE.—Object to the question for the reason that the record is the best evidence.

A. I believe it was in '91, just from recollection.

Mr. LOEB.—Well, that was stipulated to any way.

Mr. WALLACE.—I would not have objected, if Mr. Bickel's recollection had been correct.

Q. The stipulation shows that the United States survey of township 15, north of range 4 west of the Montana Principal Meridian, in Lewis & Clark County, State of Montana, as the same appears on file and of record in the United States Land Office at Helena, Montana, bears date April 28 to May 6, 1890, and that it was approved by the Surveyor-General August 10th, 1891—is that correct?

A. Yes, sir.

Q. And it was the survey that was made April 28 to May 6, 1890, that was approved by the Surveyor-General August 10th, 1891, and of which the plat was filed in the land office on October 1st, 1891, that you made for the Government? A. Yes, sir.

Do you know what steps, if any, Trodick took to enter land after the survey had been made there—the southeast quarter of section thirty-five, township 15, north of range 4 west, Helena Land District?

(Testimony of Paul S. A. Bickell.)

Mr. WALLACE.—Objected to as immaterial and because the evidence offered is secondary evidence.

A. It was just before the plat was filed. He came in and asked if he could file and we went before Judge Eddy.

Mr. WALLACE.—If that is all the answer, I move to strike out the answer of the witness in so far as it relates to statements of Trodick, on the ground that they are hearsay.

Q. What did you do with Trodick—where did you take him—where did you go?

A. I don't know how to answer that question; he came here in Helena and went before Judge Eddy.

Q. Were you present? A. Yes, sir.

Q. How long was it after the survey that you made that Trodick came to Helena to enter this land?

A. It was the year following, I believe.

Q. That was, if the survey was made in '90—this was in '91? A. Yes, sir.

Q. And do you know whether it was before the plat was filed in the land office or afterwards?

A. It was before the plat was filed.

Q. Do you know, Mr. Bickell, something of the value of land down there—that is, the *Lammlein* land and the Trodick land, and this land that you say is in the southeast quarter of section 35?

A. Why, I couldn't tell just what that land was worth; no, sir.

Q. Could you give us an estimate of the value of it?

(Testimony of Paul S. A. Bickell.)

Mr. WALLACE.—We object to the question as witness has not qualified to testify as to values of land.

A. I wouldn't want to state; I don't know what that ground is worth.

Cross-examination.

(By Mr. WALLACE.)

Q. Mr. Bickel, you formed the conclusion that Trodick was on the same land that *Lammlein* had been on from something that you saw when Trodick was there, and when *Lammlein* was there, of course?

A. Yes, sir,

Q. I suppose you can tell us what that something was on each occasion, can't you? A. Yes, sir.

Q. Will you please tell us what you observed as to the occupancy of each?

A. Why, I ran one line there on the boundary of the township and the section corner and the quarter corner of the south boundary *lie* south from where Trodick's house is, and where Mr. *Lammlein's* house was; and I had understood at the time that Mr. Trodick had bought out Mr. *Lammlein*; they had a little home there and were living there; and Mrs. *Lammlein* was living there at the time, I believe, when Mr. Trodick was there at the time I made the survey.

Q. Then, eliminating what you understood, you determined this matter of identity of occupancy from the fact that the house stood in the southeast quarter of that section? A. Yes, sir.

(Testimony of Paul S. A. Bickell.)

Q. Was there anything else that caused you to reach the conclusion of identity of occupancy?

A. I don't understand what you mean.

Q. Did you see anything else as to the occupancy that impressed you, as being identical in both instances, beside the house?

A. Only that the road in front of the house and the hills were right where I had seen them before.

Q. Now, was there any enclosure of any kind?

A. Yes; they had a small garden there enclosed.

Q. What was the extent of the enclosure you saw the first time?

Mr. LOEB.—Objected to as not proper coross-examination and irrellevant and immaterial.

A. Why, there was some changes, I presume, but I don't remember just what they were.

Q. You are not sure that the enclosures were the same in the case of Trodick as in the case of *Lammlein*?

A. Only that he lived in the same house that the other one did.

Q. That is all you are sure of?

A. Yes, sir.

Q. But you are not sure that the enclosures outside of the dwelling walls were the same?

A. The enclosures were probably a new fence, but practically in the same place.

Q. Well, then, what area was enclosed?

A. There was several areas enclosed.

Q. Well?

(Testimony of Paul S. A. Bickell.)

Mr. LOEB.—Objected to as not proper *corss-examination* and irrelevant, incompetent^{na} and immaterial.

A. One was the garden; and the corral and more or less brush fences.

Q. What was the size of the garden?

Mr. LOEB.—Objected to as not proper *corss-examination* and irrelevant, incompetent and immaterial.

A. I didn't measure the garden; it probably was a few acres enclosed; everything; I couldn't say, exactly.

Q. I don't want it exact, but I have absolutely no idea, and you have some.

A. Well, it was kind of a coggled-up affair, the place where they had run the brush fences.

Q. Roughly, what would you estimate the area of the garden enclosure at?

Mr. LOEB.—Objected to as not proper cross-examination, and incompetentⁿ, irrelevant and immaterial.

A. I couldn't tell exactly what it was.

Q. I don't want it exactly.

A. That would be pretty hard to say.

Q. Was it half an acre?

Mr. LOEB.—Objected to as not proper cross-examination, and incompetentⁿ, irrelevant and immaterial.

A. Yes, it was more than half an acre.

Q. More than two acres? A. Yes.

Q. More than four acres?

(Testimony of Paul S. A. Bickell.)

Mr. LOEB.—Objected to as not proper cross-examination and irrelevant, incompetent, and immaterial. A. I don't know.

Q. You are not sure that there was over four acres in the garden enclosure? A. No.

Q. The garden was enclosed by a brush fence, was it?

A. No; I believe it was a picket fence—part of it. Part of it was a log fence.

Q. Picket and log fence?

A. Yes; and the corrals were log fences—very heavy log fences.

Q. And the corral enclosed how much ground?

A. I wouldn't like to say, because I could not tell exactly.

Q. Half an acre?

Mr. LOEB.—Objected to as not proper cross-examination and irrelevant, incompetent and immaterial. A. No, sir.

Q. Do you know whether it was more or less than half an acre? A. I couldn't say, as to that.

Q. Might not have been over half an acre?

Mr. LOEB.—Objected to as not proper cross-examination, and incompetent, irrelevant, and immaterial. A. No, sir.

Q. Now, was there any other enclosure beside the garden and the corral?

Mr. LOEB.—Objected as not proper cross-examination, and incompetent, irrelevant and immaterial.

A. Yes, there was some land fenced.

(Testimony of Paul S. A. Bickell.)

Q. How much?

A. I couldn't say as to that.

Q. I don't want you to tell me exactly.

A. It is very hard to tell, because I didn't go to see whether these fences ran into the creek; they were fences that ran along the road and into the brush, and the brush was pretty thick, and you would have to follow them all the way along to tell.

Q. All the fences you saw were in the bottom, weren't they?

A. No, I think some of them went up on the hillside.

Q. Are you positive of that? A. Yes, sir.

Q. Can you tell me anything about the area of hillside that was fenced?

Mr. LOEB.—Objected to as not proper cross-examination, and incompetent, irrelevant and immaterial. A. No, I could not.

Q. Would you say that there was as much as twelve acres that you saw of enclosed land on the place when you saw it when *Lammlein* was there?

Mr. LOEB.—Objected to as not proper cross-examination and incompetent, irrelevant and immaterial.

A. Well, I don't hardly think there would be that much.

Q. You know, of course, that there was no attempt to enclosed by boundaries the southeast quarter of section 35, as such, when you saw the premises while *Lammlein* was there?

(Testimony of Paul S. A. Bickell.)

Mr. LOEB.—Objected to as improper cross-examination and incompetent, irrelevant and immaterial.

A. No; there was nothing on the lines that I ran at the time.

Q. Do you know where the present bridge across the creek is at Wolf Creek Station, Mr. Bickel?

A. Yes, sir.

Q. Do you know whereabouts the south boundary line of section 35 is with reference to that bridge?

A. I think the bridge would fall just north of the line—it would be very close.

Q. I will show you what purports to be a copy of the townsite map of Wolf Creek, and ask you if that purports to represent this south boundary line of section 35 that you have spoken of?

Mr. LOEB.—We object to the use of this plat that is now *show* the witness, for the reason that it has not been identified as the official plat of the townsite of Wolf Creek, and there is no showing made that any steps as required by the statute with reference to townsite plats have been complied with, and it is immaterial, incompetent and not proper cross-examination.

Q. The question is, to put it briefly and save repetition, is that line that you have spoken of, as the south line of section 35, purported to be set forth on that map?

A. I could not say if it is right or wrong.

(Testimony of Paul S. A. Bickell.)

Q. That was not my question. Now, listen to the question, please. (Question read to witness as previously given.)

Mr. LOEB.—Same objection as to the preceding question.

Q. Not whether it is right or wrong, but does it appear, or purport to appear on that paper?

Mr. LOEB.—Same objection, as to the question second before the last.

A. The line, as it is shown here, is not as it was.

Q. Why don't you answer my question? You certainly can answer that question. I am not asking you if the line, as it appears there, is correct. The question is whether there is an apparent south line shown on that paper.

A. The line does not represent the south boundary, if that is *what* you want to know.

Q. There is not a line there that purports to represent the south boundary of section 35?

Mr. LOEB.—Same objection.

A. I would not recognize it as the south boundary.

Q. You would not recognize it as purporting on that map to be the south boundary?

A. Only that it says there that it is the south boundary of section 35. Somebody has printed it on there.

Q. Well, it purports to be there, a line so denominated?

Mr. LOEB.—Same objection.

(Testimony of Paul S. A. Bickell.)

Q. Aren't you able to understand the question, or don't you want to answer it?

A. I don't see that I could answer that question—there is nothing here showing that the section corner is on the plat at all.

Q. Do you find any line represented there, purporting to be a survey?

Mr. LOEB.—We object to this on the ground that the paper counsel offers the witness has not been identified in this proceeding, and that it is not an official plat of the townsite of Wolf Creek and that the requirements of the statute with reference to townsites have not been complied with in reference to the townsite of Wolf Creek, and on the further ground that it is improper cross-examination and irrelevant, immaterial and incompetent.

A. Yes.

Q. What is that line called on that map?

Mr. LOEB.—Objected to for the same reason as above given.

A. South boundary of section 35, township 15 north of range 4 west.

Q. Is that description, regardless of whether it is actually correct or incorrect, an allusion to the line that you have spoken of in your testimony as the south boundary of 35, surveyed by you?

Mr. LOEB.—Same *object*.

A. Yes, sir.

Q. Have you ever made any survey down there since the new bridge was constructed across Prickly Pear Creek—the present bridge—of that line, or along that line?

(Testimony of Paul S. A. Bickell.)

Mr. LOEB.—Same objection.

A. I have gone through—

Q. Now, the question is, simply, have you made a survey? A. No.

Q. Was that bridge in existence at the time you made your survey in 1890? A. No, sir.

Q. How far over toward the foothills on the south side of the creek did the enclosure that you saw there in 1890 extend?

Mr. LOEB.—Same objection.

A. I don't think there was any regular enclosure south of the line at that time?

Q. Sure of that?

A. There was some brush fence over there.

Q. Some brush fence over there? A. Yes.

Q. Do you know whose fences these brush fences were?

Mr. LOEB.—Objected to as not proper cross-examination, and incompetent, irrelevant and immaterial.

A. Why, I supposed they belonged to the same property.

Q. Apparently, part of the same fence?

Mr. LOEB.—Same objection.

A. Only what I would judge from it; I never heard anybody say.

Q. Well, you judged from what you saw—the conditions on the ground, as you saw them?

A. Only there was nobody else there, that I saw, that had any claim.

(Testimony of Paul S. A. Bickell.)

Q. What extent of fence did you see over there on the south side—this brush fence you have described?

Mr. LOEB.—Same objection.

A. Now, I don't remember whether this was before or after—whether these enclosures were made before or after; I have a faint recollection of seeing something of that sort. Wild grass.

Q. Fences made of wild grass? A. No.

Q. What extent of fences did you see over there?

A. I couldn't say.

Q. When you ran that south line, did you see the section corner between section 35 and section 2?

A. I saw the quarter corner.

Q. Did you see both section corners between the two sections on each end?

A. Well, that is, the section lines that come up from the south don't corner with the north and are not identical with the corner line north of the township line.

Q. What was the nearest corner that you saw eastwardly from this quarter corner? Between section 35 and 2?

A. I found the corner there that had been surveyed.

Q. Did you adopt it? A. Yes, sir.

Q. Do you remember what its markings were?

A. The markings were not on the stone pile.

Q. Did you put any on? A. Yes, sir.

Q. Do your field-notes up in the surveyor-general's office show what markings you put on?

(Testimony of Paul S. A. Bickell.)

A. Yes, sir.

Q. Which you put on the monument. Do you remember what your field-notes called for?

A. Yes, sir—1-5.

Q. Now, going eastward from that quarter corner on that south line, where did you next see a corner.

A. Eastward?

Q. Yes.

A. That was the furthest east that my survey went.

Q. You stopped at this quarter corner?

A. No—that is going west.

Q. Half a mile eastward?

A. That is the corner I spoke of.

Q. That you marked 1-5? A. Yes, sir.

Q. In other words, the first quarter corner between the two sections to the eastward of the bridge over the Prickly Pear Creek at Wolf Creek?

A. That was the section corner—this is the quarter corner. (Witness indicates on plat.)

Q. Now was it the section corner eastward of the bridge that you marked 1-5, or the quarter corner to the westward of the bridge that you marked 1-5?

A. The east one.

Q. That is the section corner? A. Yes, sir.

Q. And this is the first corner west of the section corner? A. Yes.

Q. And that is half a mile eastward?

A. Yes, sir.

Q. And it is the northeast corner of 2, isn't it?

A. Yes, sir.

(Testimony of Paul S. A. Bickell.)

Q. And the other side?

A. It is the southeast corner of 35.

Q. Southeast section corner of 35?

A. Yes, sir.

Q. The first quarter corner to the westward you marked how? A. 1-4.

Q. That is figures or words?

A. Figures, 1 bar 4.

Q. The fraction one-fourth in figures?

A. Yes.

Q. Simply 1 bar 4? A. Yes, sir.

Q. And the section corner monument was there?

A. The stone and the mound stone.

Q. How marked?

A. One on the east and five on the west—just marked.

Q. They were marked on the ground as stated by you in your field-notes, were they?

A. Yes, sir.

Redirect Examination by Mr. LOEB.

Q. Mr. Bickell, you stated that there were no more than 12 acres enclosed that you saw enclosed there by *Lammlein*. You don't mean to be understood as saying that that was all the land that *Lammlein* claimed there for his homestead, do you?

Mr. WALLACE.—Objected to as leading and incompetent.

A. I don't know whether he claimed any, understand me; but he was living there and had an enclosure there.

(Testimony of Paul S. A. Bickell.)

Q. Well, Mr. Worth would know more about the the extent of land that he claimed than you would?

Mr. WALLACE.—Objected to as calling for an opinion, and a comparison of the witness' evidence with that of other witnesses, and incompetent and immaterial. A. Yes, I suppose so.

Q. Don't you know that he would know more of it than you would?

Mr. WALLACE.—Same objection as last given.

Q. About the extent of land he had and what the land was that the claim affected?

Mr. WALLACE.—Same objection.

A. Yes, sir.

Q. You didn't, Mr. Bickell, undertake to ascertain how much land *Lammlein* was claiming when you were there the first time?

Mr. WALLACE.—Same objection.

A. No, sir.

Q. You gave it no attention—as to the extent of land he was claiming?

Mr. WALLACE.—Same objection.

A. No, sir.

Q. Now, do you know where the buildings at Wolf Creek are now—that is, the present town of Wolf Creek—where Mr. Forman's house is, and where Mr. McDonald's house is and Mr. Trodick's house and the Bissonette Blacksmith shop, and the public hall—do you know where all these buildings are?

A. Yes, sir.

(Testimony of Paul S. A. Bickell.)

Q. What have you to say as to whether these buildings are located on the identical ground that *Lammlein* had?

Mr. WALLACE.—Objected to as not redirect examination and leading.

A. Yes, sir.

Q. Did you notice on this plat that Mr. Wallace on cross-examination brought to your attention, which is marked or purports to be the townsite of Wolf Creek—are all these lots beginning at lot 1, 2, 3, 4, 5, 6, 7, 8 and 9, on the east side of Bridge street, and facing what purports to be Auchard avenue, and lots 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, west of Bridge street and facing what purports to be Auchard Avenue, are they all on the land that *Lammlein* claimed?

Mr. WALLACE.—Objected to as *no* redirect examination and leading and assuming a knowledge by the witness of what *Lammlein* claimed, when he has already disclaimed any such knowledge.

A. Why if this plat represents the section line and the county road as it was at that time, I should say it was the ground that *Lammlein* was on.

Q. Now did *Lammlein* claim the ground alson including lots 1, 2 and 3 of block 3, west of the bridge?

Mr. WALLACE.—Same objection.

A. I don't know.

Q. What have you to say as to 4—block 4?

A. Why, I don't know what he claimed—if he claimed the southeast quarter, it is all on that land.

(Testimony of Paul S. A. Bickell.)

Q. Then all these buildings at Wolf Creek and in the townsite of Wolf Creek is on the southeast quarter of section 35, township 15, north of range 4 west?

Mr. WALLACE.—Objected to as leading and *no* redirect examination.

A. It is on the southeast of 35; yes.

Q. And the land that you say that *Lammlein* had enclosed there, the 12 acres, that you know he had enclosed at that time, did that include the bottom of Wolf Creek?

Mr. WALLACE.—Objected to as leading and not redirect examination. A. Yes, sir.

Q. And is it on this bottom that these houses have since been established?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. Now, when you first saw the bottom there at Wolf Creek, Mr. Bickell, when you first saw *Lammlein* there, were any of these houses that are now built there, located there, other than the Trodick house?

A. When I first saw them?

Q. Yes. A. No.

Q. Were any houses on any of these lots east of the bridge on lots 1 and 2 of what purports to be the townsite plat of Wolf Creek, Montana—which was shown to you by Mr. Wallace on cross-examination, were there any houses on these lands east of the bridge, at the time you made the survey, other than the Trodick house?

A. I don't know, I wouldn't say because I am not sure.

(Testimony of Paul S. A. Bickell.)

Q. But you are sure that there were none there when *Lammlein* went there?

Mr. WALLACE.—Objected as leading.

A. None there.

Q. When did you first see Trodick there?

A. That was at the time I made the survey; I think it was.

Q. Could you tell us the kind of a house that *Lammlein* had when you first went there?

A. I think it was part stone and part wood.

Q. Was it substantially made?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. Did you go into the house, Mr. Bickell?

A. I was in the house once; yes, sir.

Q. What would you say as to whether it was constructed and built with a view to permanency or not?

A. It was a little, comfortable home for the two old people that were there.

Q. How long would you say, from appearances as they presented themselves to you at the time you were there, had that house been there—was it new?

A. No, it didn't appear to be new; only part of it. They had been building on parts off and on from the way it looked.

Q. Could you give us an idea as to how long before you think the house had been erected?

Mr. WALLACE.—Objected to as opinion evidence.

A. It looked as if it had been there for a few years.

(Testimony of Paul S. A. Pickell.)

Q. The line which is shown as the south boundary line of section 35, township 15, north of range 4 west, on this plat, which Mr. Wallace presented to you on cross-examination, I understood you to say was not correctly depicted on this map?

Mr. WALLACE.—Objected to as leading.

A. No, I think you are mistaken in regard to what I said.

Q. What was it you said with reference to that?

A. The line may be all right so far as I know, but it is not the way it looked at the time I surveyed it.

Q. What was your idea at the time that you surveyed it, that the line would be north or south of the point that is given on this map?

A. At that time the creek cut across the line near the quarter corner, and came down this side; since then the creek has been washed out and changed by the railroad company and put on the north side.

Q. Then this map that was presented to you by Mr. Wallace, does not depict the line of the creek as it was when you surveyed it, but rather as it is now?

A. No, sir.

Mr. WALLACE.—Objected to as leading.

Q. It represents the changed conditions?

A. Yes, probably has changed since then.

Q. What has made these changed conditions?

A. Why, when the railroad was put through there and after they had a large flood which undermined the depot and tore up the tracks all through there and put a great deal of this land on the south side of the creek

(Testimony of Paul S. A. Bickell.)

instead of on the north side where it used to be—the creek used to flow nearer to the hills on this side—the south side.

Q. That is correct. When you made the survey, you ran the same south of the south boundary line of section 35, township 15, north of range 4 west?

A. Yes, sir.

Q. Was it land north of the creek that *Lammlein* was occupying?

Mr. WALLACE.—Objected to as leading and not redirect examination.

A. He was living on the north side of the creek.

Q. You have not made a survey since the bridge was located there? A. No.

Q. Do you recognize from the map as about where the bridge is with reference to *Lammlein's* house and the land?

A. Why, if you were to take this map for it, I should say that *Lammlein's* house was about in lot 3 or 4 in block 1 on this plat.

Q. So *Lammlein's* house was considerably north and west of the point given as the bridge?

Mr. WALLACE.—Objected to as leading.

A. Yes.

Q. How many feet would you say would *Lammlein's* house be north of a point on this map Mr. Wallace produced, established as the bridge?

A. About 6 or 700 feet northwest.

Q. Did you examine his fences—the *Lammlein* fences at the time you made the survey, to run them

(Testimony of Paul S. A. Bickell.)

out to see where they ran in the brush, or to see what land they actually took in? A. No.

Q. You were not down there for the purpose of surveying *Lammlein's* land, but for the purpose of surveying the township? A. Yes, sir.

Q. You didn't run out these fences?

A. No, sir.

Q. Was anybody else living on this land—the southeast quarter of section 35, township 15, north of range 4 west at the time you made the survey, other than Trodick and Mrs. *Lammleing*?

A. I am not so sure about that.

Q. Well, was there anyone there?

A. You see I have been in there several times and I don't remember particularly who was there.

Q. Well, were there any other ranches in that flat other than *Lammlein's* at that time that you knew of?

A. I had no knowledge of them; no.

Q. You didn't see any other farmhouse there or any other ranch-house?

A. That is all, as far as I know.

Q. Did you see any other enclosures there, other than the *Lammlein* or Trodick enclosures?

A. No, I believe not.

Q. Have you been to this land since the establishment of that bridge? A. Yes, sir.

Q. You know, then, about where the *Lammlein* house is with reference to the bridge and the land?

A. Yes, sir.

(Testimony of Paul S. A. Bickell.)

Q. Did you in making your survey find it necessary to cross the Prickly Pear Creek to the south of *Lammlein's* house? A. Yes, sir.

Q. Did you find any ranches between the south boundary of section 35, township 15, north of range 4 west and the *Lammlein* house?

A. No, sir.

Recross-examination by Mr. WALLACE.

Q. When the term flat was used, Mr. Bickell, in the question as to whether you saw any other occupancies or enclosures in the flat than the Trodick or *Lammlein* occupancy—in your answer to it you assumed, didn't you, that it meant the bed of the canyon there between the mountains on each side?

A. Yes, sir.

Q. The depot of the Great Northern at Wolf Creek station—do you remember whether that stood on the south or the north of the south line of section 35 as you established it?

A. It stood just south, as I remember it.

Q. Just south of the line? A. Yes, sir.

Q. How about the water-tank?

A. I don't think the water-tank was there at the time.

Q. How about the section-house?

A. The section-house—it came very close to it.

Q. But south?

A. No, I think the section-house was north.

Q. The section-house was north of the line?

A. Yes.

Q. The tracks?

(Testimony of Paul S. A. Bickell.)

A. It crossed the tracks west from the depot.

Q. West of the depot?

A. Yes, that would be south of the line.

Q. That is, it crossed the tracks going from south to north, at a point westward of the depot?

A. It crossed the tracks—it was running from the south to the north, west of the depot, yes, sir.

Q. And about how far westward of the depot did it cross the tracks, if you are able to tell us?

A. It was not a great distance, because the quarter corner is not so far from the depot.

Q. Is it down by the quarter corner?

A. It would cross it from a diagonal, I would say, and I think it was nearer the quarter corner than the depot.

Redirect Examination by Mr. LOEB.

Q. Now, all of the land in this flat north of the south boundary line of section 35, township 15, north of range 4 west, up to the mountains, was that included in the *Lammlein* and Trodick occupancy?

Mr. WALLACE.—Objected to as leading and not redirect examination.

A. I think it was. I wish to make a correction. If my memory does not fail me, at the time I made the survey there was—it was just shortly after the flood, understand me, wasn't it—

Q. No, you made the survey in 1890 and the flood, wasn't until '92.

A. Well, I have got another time that I was down there that I saw this house tipped over—this section-

(Testimony of Paul S. A. Bickell.)

house. There was some change there then between the time I was there and the other time.

Q. But what I am not clear about, Mr. Bickell, and what I would like to understand, is whether all of the land north of the south boundary line of section 35, township 15, north of range 4 west, in what Mr. Wallace called your attention to as having been described by you as a flat at Wolf Creek, whether all of that land—that is, the land lying north of the boundary line, and extending to the mountains—was included in the *Lammlein* or Trodick occupancy?

Mr. WALLACE.—Objected to as leading and vague in the use of the term “occupancy.”

A. Well, it depends on what you call occupancy. I would like to know that first.

Q. Was anyone else occupying any land in the southeast quarter of section 35, township 15, north of range 4 west—any other ranches or farms, when you first went there?

A. I think not—except the railroad—they had their tracks there.

Q. Well, outside of the railroad, *Lammlein* was occupying the entire flat north of the south boundary line of section 35, township 15, north of range 4 west?

Mr. WALLACE.—Objected to as leading.

A. He had been, but as I understand it, Mr. Trodick had bought his rights out.

Mr. WALLACE.—Move to strike out the latter part of the answer after “he had been” as hearsay.

(Testimony of Paul S. A. Bickell.)

Q. Then you desire to be understood as that when you went there in 1890 that Trodick instead of *Lammlein* was occupying all of the land north of the south boundary line of section 35, township 15, north or range 4 west, and between that point and up to the mountains?

Mr. WALLACE.—Objected to as leading and indefinite with reference to the use of the word “occupancy.”

A. I don't know how much he claimed. He occupied part of that ground.

Q. Was anybody else claiming any that you saw?

A. Not that I know of.

Q. Now the depot, you say, is just south of the line; has the railroad track been changed since you first went there?

A. Why it has been changed, but not a great deal where the depot is.

Q. What was the occasion for the change of the railroad tracks?

A. As I understand it, they wished to keep on one side of the creek so that they would not be washed out again as they had been.

Q. Was the railroad track rebuilt north or south of where the original track was,—the change?

A. Most of it was put south.

Q. That is, the track as it now stands is south of the point where the track stood as it was originally located or constructed?

A. In section 2 I would say it was put south, and right at the depot, maybe a few feet north.

(Testimony of Paul S. A. Bickell.)

Q. Well, has the depot been changed,—any change in the location of the depot?

A. Not to speak of, very little change, there, if at all.

Q. Do you know what occasioned the change down there? A. The flood.

Q. And it was at the time the railroad track was changed that the bed of the creek was changed?

A. Yes, sir.

Q. Both changes were at the same time?

A. Yes, sir.

Q. These were both made after you made your survey? A. Yes, sir.

Recross-examination by Mr. WALLACE.

Q. So that, as I understand it, Mr. Bickell, at the point where the depot is and opposite the present bridge over the creek, the track after the change was a few feet further north than it had been at the time you made this survey in 1890?

A. That is the way I understand it; I never *measure* it, understand me.

Q. And the depot you consider as in substantially the same position to-day that it was in when you made the survey in 1890? A. Yes, sir.

Redirect Examination by Mr. LOEB.

Q. You wouldn't undertake to tell us, *Mra.* Bickell, how far north the track was moved—that is, you don't know—you never measured or surveyed it to know exactly?

Mr. WALLACE.—Objected to as leading.

(Testimony of Paul S. A. Bickell.)

A. No, but that could easily be obtained by going on to the ground.

Q. You simply undertake to tell us that there was a change in the location of the track—a north and south change?

A. Yes, sir.

Q. And this change was brought about by reason of the change in the bed of the creek?

A. Yes, sir.

Q. Now could you tell us how much change there was in the bed of the creek in a north and south direction?

A. No, but I think that can be obtained from a plat.

Q. But could you tell us approximately?

A. No, I couldn't tell you.

Q. Was it a considerable change?

Mr. WALLACE.—Objected to as called for an opinion and inference of the witness.

A. I don't know.

Q. Well, they threw the creek considerably to the south, didn't they, of the original creek?

A. No, I would say they put it north.

Q. They put it north?

A. Yes, sir.

Q. And on which side of the creek does the railroad now run?

A. It runs on the south side.

Q. To what extent did this change take place in the change of the bed of the creek and the track in a lineal direction?

A. I wouldn't say. If I remember right, it was quite a stretch there; you can get that from plats,

(Testimony of Paul S. A. Bickell.)

that have been made on the railroad, original plats, very nicely; they show it all the way through there, and give it more accurate than I could give it.

Q. Would you say half a mile?

Mr. WALLACE.—Objected to as leading and calling for an inference. A. No.

Q. A quarter of a mile?

A. Yes, I would say it would be a quarter of a mile.

Q. So that in an east and west direction for about a quarter of a mile there was a change in the location of the bed of the creek, and also in the location of the Montana Central Railroad track—after the flood?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. And all this change took place between practically the $\frac{1}{4}$ section corner and the southeast quarter of section 35, township 15, north of range 4 west, and the point which you marked as the southeast corner of section 35?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. Now, will you tell us again the two points between which this change took place?

A. Well, I would say approximately a quarter of a mile between the quarter corner and the south corner of section 35.

Q. You would mean to be understood that practically for that entire length there was a change in the track and in the location of the creek.

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

That is all.

PAUL S. A. BICKEL.

Subscribed and sworn to before me this 13th day of January, 1905.

A. K. BARBOUR,
Special Examiner.

Mr. LOEB.—I would like to have the record show that complainants called for the map that Mr. Wallace, counsel for defendants, used upon the cross-examination of the witness Bickell; and ask to have the map identified so that Mr. Bickell's testimony can be intelligible.

Mr. WALLACE.—Counsel for defendant here inquires for what purpose the complainant desires the production of the map.

Mr. LOEB.—Counsel for complainant replies by stating that counsel for defendants used the map in the cross-examination of the witness Bickell, and that the map was continually referred to and in the hands of the witness *Bickell* during the course of his cross-examination and redirect examination, and without said map in the possession of the Court, the testimony of the witness Bickell, or a portion thereof, would be unintelligible and not clear, and therefore counsel asks the Examiner to mark the map for identification and that it be made a part of the files in this cause.

Mr. WALLACE.—In response to the request of complainant for the production of the map in evidence, the defendants now offer the same to the Examiner.

(Testimony of John Trodick.)

The EXAMINER.—Let the record show that the map is marked as Exhibit 1 to Bickell's testimony.

Mr. LOEB.—I would now like to call Mr. Trodick for a little further examination. Mr. Trodick, will you please take the stand?

JOHN TRODICK, recalled for further examination:

Direct Examination by Mr. LOEB.

Q. Mr. Trodick, I want to ask you who was present when you paid the first \$60.00 for the land that you live on now? A. George Houghton.

Q. And who else?

A. Mrs. *Lammlein* and her niece.

Q. Was Mrs. *Lammlein* there? A. Yes.

Q. Then there were present Mrs. *Lammlein*, Mrs. *Lammlein's* niece and George Houghton?

A. Yes, sir.

Q. Now, Mr. Trodick, what would you say the value of the land that you sought to enter in the land office as a homestead would be without taking into consideration any of the buildings that have been put there since you went upon the land?

Mr. WALLACE.—Objected to as not being preceded by any foundation or qualification to make the testimony competent, and as indefinite in period.

Q. Mr. Trodick, do you know what the value of land is in the vicinity of Wolf Creek?

A. At present I don't know; I could not state. But at that time I know the value of the land as I took it from Mrs. *Lammlein*, and the improvements

(Testimony of John Trodick.)

that was there—I figured it was worth about \$3,000.-00—what I figured what I bought was worth.

Q. What you bought of *Lammlein*?

A. Yes.

Q. Has the land depreciated any in value since you bought it of *Lammlein*?

Mr. WALLACE.—Objected to as leading.

A. Yes—improved of course.

Q. It has got more valuable has it?

Mr. WALLACE.—Objected to as leading.

A. Yes.

Q. Has it got any less valuable?

A. Got more valuable.

Q. And when you say you think it was worth \$3,000.00, you meant without McDonald's building, and Forman's building and the other buildings that have since been put there?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir—without any of them.

Cross-examination by Mr. WALLACE.

Q. What did you agree to pay Houghton for what you bought there at that time?

A. From *Lammlein*?

Q. Yes. From Houghton or *Lammlein*, what did you agree to pay?

A. I agreed to pay \$300.00 cash—that is, \$300.00 to his wife.

Q. That was the full price that you agreed to pay?

A. Yes.

(Testimony of John Trodick.)

Redirect Examination by Mr. LOEB.

Q. *Lammlein* was sick and about to die, was he?

Mr. WALLACE.—Objected to as leading.

A. Yes, sir.

Q. And his wife was very old, was she?

Mr. WALLACE.—Objected to as leading.

A. She was about 83.

Q. And they were very anxious to leave the country, were they?

Mr. WALLACE.—Objected to as leading.

A. Yes, I believe so.

Q. Did you think you got a bargain then?

Mr. WALLACE.—Objected to as leading and calling for an opinion of the witness and immaterial.

A. I did.

Q. Had the land been surveyed when you bought *Lammlein's* right and improvements?

A. No, the land was surveyed soon afterwards. It was in 1889 when I bought it; he died in '89.

That is all.

Mr. LOEB.—The complainant rests.

His

JOHN X TRODICK.

Mark

Subscribed and sworn to before me this 20th day of January, 1905.

A. K. BARBOUR,

Examiner.

Mr. WALLACE.—At this time the defendants move to dismiss the action on the ground of failure of proof and for each and all of the reasons assigned

in the objections to the introduction of any evidence on the hearing.

A written stipulation, signed by the parties to the suit, as to certain facts, is handed to the Examiner for identification and filing as a part of the evidence in the case.

Mr. LOEB.—Subject to the objections as stated in the stipulation.

Mr. BULLARD.—Well, the stipulation shows for itself.

Mr. WALLACE.—I now offer in evidence the original lease, dated February 1st, 1891, marked Defendants' Exhibit 1, by Henry N. Blake, Examiner, from John Trodick to Charles Forman and George Forman. As to this it is conceded that the plaintiff John Trodick executed the same, and that what purports to be his mark in the signature thereto was made by him before Edward R. Billings, the notary who took his acknowledgement. This stipulation identifying the paper is made subject to the right to interpose the objections now urged by the complainant thereto.

Mr. LOEB.—Complainant objects to the introduction of the lease in evidence on the ground that it is irrelevant, immaterial and incompetent.

Stipulation Relative to Spelling of Certain Names in Record.

Mr. WALLACE.—It is here stipulated that the complainant's correct name is John Trodick, and wherever the name John Trodick appears in the testimony or the files or papers introduced in evidence in the record of this cause, it shall be deemed to

be John Trodick, and that they are one and the same person. And that in some places the name is given as Martin *Lammlein* and in other places as Martin Lemline, but one and the same person is meant and intended as with reference to *Trodrick* and Trodick. And the foregoing stipulation as to the complainant John Trodick, shall be deemed to apply in a similar way as to his sons Al or Alfred Trodick and Charles Trodick.

The EXAMINER.—I hereby certify that the foregoing stipulation was entered into by and between the counsel for the parties in this case.

A. K. BARBOUR,

Examiner.

Mr. WALLACE.—It is hereby stipulated that the receipt marked by Examiner Barbour Exhibit A-1 of Defendants is the original receipt executed and written by David Auchard upon plaintiff's bar as testified to by him, and received by the complainant at the time of the payment of the money, testified by the complainant to have been paid by him to David Auchard, which said receipt was delivered by the complainant to defendant's counsel on request by them made therefor.

Mr. LOEB.—Complainant objects to the introduction of the said receipt on the ground that it appears from the testimony of Trodick, when examined with reference thereto, that the same was executed in the pursuance of an attempted compromise of the litigation between the Railroad Company and Auchard, on the one hand, and Trodick on the other.

(Testimony of Charles Forman.)

The EXAMINER.—The hearing will now be adjourned until two o'clock this afternoon.

CHARLES FORMAN, a witness called on behalf of defendant, sworn, testified, as follows:

Direct Examination.

(By Mr. WALLACE.)

Q. What is your full name?

A. Charles Forman.

Q. How old are you?

A. Forty-three, I think.

Q. Married or single? A. Single.

Q. You have been married?

A. Have been married, yes, sir.

Q. A man of family? A. Not any family.

Q. How long have you lived in Montana?

A. About 20 years,

Q. What is your present business?

A. Keeping a hotel and feed barn.

Q. Where? A. Wolf Creek, Montana.

Q. Do you know John Trodick, the plaintiff?

A. Yes, sir.

Q. When did you first go down to Wolf Creek to live? A. 1890.

Q. What time of the year, 1890?

A. I think it was in the fall, about October—some time in there.

Q. Where have you lived ever since?

A. I have lived right there, sir.

Q. Do you know what is spoken of as the old *Lammlein* house? A. Yes, sir.

(Testimony of Charles Forman.)

Q. Do you know the railroad buildings?

A. Yes, sir.

Q. What buildings were on the ground in the flat or bed of the canyon at that point when you went there?

A. When I first *wen* there in 1890?

Q. Yes.

A. There were the old *Lammlein* buildings and the railroad buildings.

Q. Who was living on the ground at that time?

A. Mr. Trodick was living in the old *Lammlein* place.

Q. Who was living in the railroad buildings?

A. Somebody in the section-house, and somebody in the station, but I don't know who they were—some railroad employees.

Q. Did you have any talk with the plaintiff, John Trodick, when you went there about putting up buildings on any part of his ground?

Mr. LOEB.—Objected to for the reason that the lease that was offered in evidence is the best evidence of what the talk was, in that the lease contains the written understanding that was arrived at between the parties, and that all negotiations were merged in the lease?

A. Yes, sir.

Q. Tell what the talk between you was.

Mr. LOEB.—Same objection.

A. The talk between I and Mr. Trodick in regards to going on this piece of ground to put a building on it?

Q. What did you say, and what did he say?

Mr. LOEB.—Same objection.

(Testimony of Charles Forman.)

A. I asked him if he would let me have a piece of ground, and he said he would, to build on. To build a butcher-shop first, and then a dwelling. Turned it into a dwelling.

Q. Were you married at that time?

A. Yes, sir.

Q. Where did you go to live?

A. I went to live in Mr. Trodick's house; that is, the old *Lammlein* place.

Q. Under what arrangements did you occupy it?

Mr. LOEB.—Objected to for the reason that a lease has been introduced in evidence by the defendants in this case, purporting to be a lease from Trodick to the witness, and that the said lease contains or purports to contain in all of the oral negotiations of the parties, and also for the reason that the said lease states the arrangement, and that the written lease is the best evidence of what the arrangement was.

A. The arrangement was for me to rent until I got my building built.

Q. Now, about what season of the year did you enter and occupy the old *Lammlein* dwelling under this arrangement or lease?

Mr. LOEB.—Same objection.

A. In November

Q. Did you ever have more than one written lease from John Trodick, the complainant?

A. No, sir.

Q. Did the ground in that lease cover at all the old *Lammlein* dwelling?

A. No, sir.

(Testimony of Charles Forman.)

Q. What was the rental, if any, agreed on for the old *Lammlein* dwelling?

A. Well, as near as I can remember, I think it was to board Mr. Trodick part of the time, and six dollars a month.

Q. Was the rental paid in accordance with the arrangements during the time that you occupied the building? A. Yes, sir.

Q. How long did you continue to occupy the *Lammlein* building under this arrangement?

A. I think it was three or four months; I could not just exactly remember.

Q. What were you doing in the way of construction work on the ground in the meantime?

A. I was building a place to live in—building a house on the other part, that I had agreed to lease—where he had agreed to lease to me.

Q. State whether or not the other part that you speak of that he had agreed to lease to you is or is not the ground covered by the written lease from Trodick to yourself and brother? A. Yes, sir.

Q. When did you get the buildings completed on the other ground?

A. They were completed—it was in the spring of 1891.

Q. When did you commence building them?

A. Commenced in the fall of 1890.

Q. When you had finished the buildings on the ground described in the written lease—what was the nature of the buildings—describe them.

(Testimony of Charles Forman.)

A. Well, it was a loghouse, about 18x24; and then a kitchen built on back, about 14x18.

Q. What was the building used for after it was completed? A. It was to live in.

Q. Any business carried on in any part of it?

A. Well, there was a butcher-shop for a while—I can't remember just how long, but a little while.

Q. Who carried on that butcher business?

A. Me and my brother.

Q. His name was what?

A. George Forman.

Q. Did you pay any rent for the ground covered by the lease, the written lease, from Trodick to yourself and brother? A. Yes, sir.

Q. Did you take any receipt at any time, or receipts, for that rent?

A. Yess, sir; took a receipt.

Q. Have you found any of those receipts?

A. I have found one; yes, sir.

Q. I show you a paper writing and ask you to state whose writing that is.

A. It is my brother's writing, made out by George Forman.

Q. There appears to be a cross-mark in the left-hand side. Who, if you know, made that mark?

Mr. LOEB.—We object to this until it is shown that Mr. Trodick executed the instrument.

A. It is Mr. Trodick's cross.

Q. The complainant in this action?

A. Yes, sir.

(Testimony of Charles Forman.)

Q. What have you to say as to whether or not it was made by him in your presence.

A. Yes, sir.

Q. You saw him make it? A. Yes, sir.

Mr. WALLACE.—Now, the paper in question is first offered to counsel for examination and then handed the Examiner for identification and marking as a exhibit.

The EXAMINER.—It is marked Defendant's Exhibit A-2.

Q. Did or did not the paper receipt that I have just shown you, Defendant's Exhibit A-2, relate to the rental for the premises described in the written lease from the complainant to yourself and brother?

A. Yes, sir.

Mr. WALLACE.—I now offer the receipt in evidence.

Mr. LOEB.—Objected to for the reason that there is no proper showing that Trodieck executed the instrument, and for the further reason that it is incompetent, irrelevant and immaterial,

Q. When you and your brother ceased to carry on the butcher business in the building put up on the ground covered by the written lease, what became of the butcher business?

A. We built a little butcher-shop on the other side of the road, and used to carry on our butcher business just the same.

Q. The road you refer to was the county road?

A. The county road; yes, sir.

(Testimony of Charles Forman.)

Q. In what year did you put up the butcher-shop across the county road?

A. In 1891, I think—'91 or '92; I am not sure.

Q. Was this second butcher-shop on the side of the road toward the creek or the side toward the mountain?

A. Toward the creek?

Q. Did the ground described in the written lease from the plaintiff to yourself cover any ground on the creek side of the county road?

Mr. LOEB.—Objected to for the reason that the lease itself is the best evidence as to what ground it covered.

A. No, sir.

Q. State whether or not before you built the second butcher-shop on the creek or railroad side of the county road, you learned of any one other than Trodick claiming that ground on the creek side of the county road?

Mr. LOEB.—Objected to as leading, hearsay, incompetent, irrelevant and immaterial.

A. Yes, sir; I remember the Montana Central was claiming that part of the ground where I built the second butcher-shop.

Q. By the Montana Central, you mean the Montana Central Railway Company?

A. The Montana Central Railway Company; yes, sir.

Q. Was any claim made upon you by them as to that ground, and, if so, by whom?

A. No, sir; there was no claim. I asked some of them if there would be anything the matter with building a shop there.

(Testimony of Charles Forman.)

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent.

Q. Whom did you ask about it?

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent.

A. I asked Mr. Johnson, the superintendent of the road.

Q. Superintendent of the railroad?

A. Yes, sir.

Q. State whether or not you were given permission to build by the Railway Company, through Supt. Johnson.

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent, and the permission in writing would be the best evidence.

A. Yes, sir; he said it was all right.

Q. State whether or not he was superintendent of the railroad at that time pointed out to you *there* ground claimed.

Mr. LOEB.—Objected to as being immaterial, irrelevant and incompetent, and for the further reason that complainant is not bound by anything that the superintendent of the Montana Central Railway Company did, and for the further reason that the evidence having relation to permission to erect a building on real property for a term of years must be in writing.

A. All I know is that the superintendent said this ground is supposed to belong to us.

Q. He indicated what ground at that time with reference to the county road?

(Testimony of Charles Forman.)

Mr. LOEB.—Objected to as leading and for the further reason that it is immaterial, irrelevant, and incompetent, and that any permission to erect a building upon the ground should be in writing.

A. Did he indicate the ground?

Q. No. The question is—he indicated what ground at that time to you, when he said he claimed this ground?

A. The ground as far as the county road at that time.

Q. That is, as far from which direction?

A. From the railroad.

Q. From the railroad track to the county road?

A. Yes, sir; north.

Q. Was the county road then in substantially the same place as it is now?

A. Just about the same; yes, sir; might have been straightened out a little since.

Q. Now, did you afterwards put up any other buildings? A. Yes, sir; I put up a barn.

Q. On which side of the county road?

A. On the same side as the butcher-shop.

Q. That is the second butcher-shop?

A. Yes, sir.

Q. And from whom did you get, if from any one, permission to put that up?

A. I got permission from Mr. Guthrie.

Mr. LOEB.—Move to strike out the last answer for the reason that it is immaterial, incompetent and irrelevant testimony.

(Testimony of Charles Forman.)

Q. Who was Mr. Guthrie?

A. Mr. Guthrie was of the firm of Foley Bros. & Guthrie, contractors.

Q. They were doing what work and for whom there at that time?

A. They were doing contract work for the Montana Central Railway Company.

Q. Was this before or after the big flood?

A. It was after the flood.

Q. And they were engaged in repair work?

A. Repair work; yes, sir.

Q. Did the plaintiff, John Trodick, in any manner, object to the construction by you of either the second butcher-shop or the stable?

A. No, sir.

Q. State whether or not he knew from the time they were begun that they were in the course of construction, until they were completed.

A. Yes, he did.

Q. Can you indicate upon the map I now show you, marked Exhibit 1 in the testimony of Paul S. A. Bickell, the ground on which you put up your dwelling the original butcher-shop, indicating it by lot numbers, if it bears any.

A. The butcher-shop is on lot 7.

Q. In Block? A. In Block 1.

Q. Can you indicate on that map substantially the ground described in this lease from Trodick to yourself, reading "a certain rectangular piece of land seventy feet by four hundred feet, lying and situate on the north side of the Fort Benton and Helena

(Testimony of Charles Forman.)

stage road, opposite the railroad station of Wolf Creek''?

A. Yes, sir,—part of it is in 6 and 7. Block One.

Q. Is that where you put up your dwellings?

A. Yes, sir.

Q. Where do you understand the depot is, as indicated on that map? A. Why it is south.

Q. Let me tell you that in this map you are looking north to the top of the map.

A. Why, then I probably have got it all wrong.

Q. I think so. A. No—here is the creek?

Q. Yes. A. And here is the store.

Q. The depot is over here? A. On 6 and 7.

Q. Do you desire, then, to correct your statement?

A. Why here is the butcher-shop, and the barn is on 7.

Q. On lot 7?

A. And this would be the south side?

Q. Yes.

A. And then here is the north; here is my dwelling—6 and 7.

Q. Lot 6 and 7 in block 1? A. Yes.

Q. Do lots 6 and 7, in block 1, or portions of it, include the 70 feet described in this Trodick written lease?

A. Yes, it is just the same parts that I leased.

Q. And whereabouts on the map, if you can indicate by lot and block numbers, is the ground that you occupied under permission from the Montana Central, through permission either from Johnson, the superintendent, or from Guthrie.

(Testimony of Charles Forman.)

A. Right here—7.

Q. Lot 7 in block 2? A. Yes, sir.

Q. Are you familiar with the markings on the ground made by the surveyor in the so-called Auchard townsite survey down there? A. Yes, sir.

Q. The Auchard survey of the Wolf Creek townsite? A. Yes, sir.

Q. What have you to say as to whether or not that map represents in a substantially correct manner the street known as Auchard Avenue, and the blocks and lots on each side thereof in that townsite as marked on the ground?

A. As far as I know that is correct.

Q. Do you feel that you know the ground markings sufficiently to be able to say that it is or is not substantially correct?

Mr. LOEB.—Objected to for the reason that the man who made the map is the best witness as to its accuracy, and that the witness has had nothing to do with the preparation of the map, and the testimony is therefore incompetent. A. Yes.

Q. After you moved into this dwelling which you put up on portions of what you have indicated as lots 6 and 7 in block 1 of the Wolf Creek townsite, where did you thereafter live after you moved in?

A. After I moved in?

Q. Yes. A. Why I lived right there.

Q. Until the present time? A. Yes, sir.

Q. Continuously? A. Yes, sir.

Q. Did you make any additions or changes to the building in the fall of the year 1892?

(Testimony of Charles Forman.)

A. Yes, sir. I built on an addition to the old part of the old log part—about 16x18, I believe—an office.

Q. If you began any business after building what you call an office, in that building, state what it was.

A. Yes, sir; I started a hotel business.

Q. When did you start the hotel business there?

A. In '92.

Q. And continued it there until when?

A. Until the present time.

Q. What, at the time the buildings were so completed in 1892, including the addition that you have described, was the value of the building that you have spoken of as the dwelling and hotel?

Mr. LOEB.—Objected to as immaterial and incompetent. A. Probably \$1,000.00.

Q. What was the then value of the barn across the county road?

Mr. LOEB.—Same objection.

A. At that time the barn was small, probably \$150.00.

Q. What was the value of the butcher-shop?

Mr. LOEB.—Same objection.

A. Oh, about \$50.00.

Q. When did you begin the occupancy of the stable as such? A. In 1892.

Q. And what has been its use since?

A. Stable business.

Q. By whom? A. By myself.

Q. When did you begin the occupancy of this second butcher-shop built across the street?

(Testimony of Charles Forman.)

A. I think that was in 1892.

Q. And what has been its occupancy and use since?

A. It has just been for a waste place to put anything since.

Q. How long did you carry on the butcher business in that building?

A. Oh, about 2 or 3 years.

Q. Beginning it in what year? A. In 1892.

Q. And in 1891 you had carried on the butcher business in the part of what building?

A. Part of the house.

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent, and the same objection to the entire line of testimony. May it be understood, Mr. Wallace, that this objection goes to the entire line of testimony?

Mr. WALLACE.—I am quite willing.

Q. In the year 1900, had you made any improvements since 1892 on the hotel building?

A. Yes, built an addition to the hotel building.

Q. When was that built? A. In 1900.

Q. Had you made any changes in the barn?

A. Yes, I had made some changes in the barn.

Q. What was the value of the hotel building in the year 1900? A. After completion?

Q. Yes, sir.

Mr. LOEB.—Same objection.

A. Why, it cost about \$2,200.00.

Q. The additional improvements?

A. The additional and some furniture.

(Testimony of Charles Forman.)

Q. Well, regardless of the furniture, what would you value the completed building at in its entirety—the hotel? A. Without the furniture?

Q. Without the furniture.

Mr. LOEB.—Same objection.

A. Between four and five thousand dollars.

Q. And what do you value the barn at?

Mr. LOEB.—Same objection.

A. From five to six hundred dollars.

Q. And you think that their fair market value?

Mr. LOEB.—Same objection.

A. At the present time?

Q. Yes. A. Yes, sir.

Q. What was the next building put up on any portion of this ground? After the buildings you put up under the written lease?

A. Mr. Angus McDonald put up a store.

Q. Angus McDonald was what relation, if any, to the defendant, Albion McDonald?

A. He was his father.

Q. When was that store put up by Angus McDonald? A. I think in '90. The fall of 1890.

Mr. LOEB.—It is understand that the *sme* objection goes to this entire line of testimony.

Q. How far was the Angus McDonald store, as built, from your dwelling?

A. It was about 250 feet, I should judge.

Q. Can you indicate upon this townsite map—exhibit 1 of Bickell's testimony—indicate its location?

(Testimony of Charles Forman.)

A. Why, it was about here, I guess. I can't tell whether it was all on 9 or part on 8.

Q. Or was wholly on lot 9 in block 1?

A. I think it is all on 9.

Q. Or partly on 9 and 8 in that block?

A. Yes, sir.

Q. Can you tell us what that building was worth when it was completed?

A. Well, I should judge about \$150.00 or seventy-five dollars.

Q. That is, \$150.00 or \$175.00? A. Yes, sir.

Q. What use, if any, was made of that building, after its completion?

A. There was a store put in it.

Q. And that store begun when?

A. In the fall of 1891, I think.

Q. And what use has been made of that building ever since?

A. Well, it was a store for quite a while; part of the time a saloon, and I don't know what it is doing to-day. I think it is empty to-day.

Q. For how many years was it occupied, either as a store building or a saloon building?

A. 'Bout ten or eleven years.

Q. Could you indicate on the townsite map, Exhibit 1 to Bickell's testimony, about where the old *Lammlein* house would be, marking a letter H with pencil where you locate it?

A. Why, I think it is on 3 and 4 block one. (Witness indicates.)

(Testimony of Charles Forman.)

Q. Are all these buildings that you have thus far described still on the ground? A. Yes, sir.

Q. Did Angus McDonald put up any other building on any other part of this ground?

A. Yes, sir, he put up another stone building, and a wood part at the top; two story.

Q. When? A. In '92.

Q. How close to the last one that you have described?

A. Pretty close—about 20 feet apart, further east.

Q. What was done with that building after its completion?

A. It was occupied as a store and the upper part was run for a while as a boarding-house—board and rooms.

Q. How soon after its completion was it put to store and boarding-house uses?

A. As soon as he got it completed.

Q. In the year 1892? A. Yes, sir.

Q. And continued so to be used for how long?

A. Well, I don't know just how long; quite a number of years.

Q. Is it there yet? A. Yes, sir.

Q. Put to any use now?

A. Yes, sir; Mr. McDonald lives in the upper story.

Q. Albion McDonald, the defendant in this action? A. Yes, sir.

Q. Do you know anything about the plaintiff, John Trodick, either alone or with others, himself

(Testimony of Charles Forman.)

constructing a saloon building on any other part of this ground?

Mr. LOEB.—Same objection.

A. Yes, sir; he built a saloon there.

Mr. LOEB.—It is understood that the record shows that this entire line of testimony is objected to for the reason that it is incompetent, irrelevant and immaterial.

Q. When was that?

A. In the fall of '92, as near as I can remember.

Q. Do you know whether previous to putting up this saloon building the plaintiff, John Trodick, had been carrying on any saloon business on any other part of this ground?

A. He had a saloon in the old house where he lives, the old *Lammlein* house first and afterwards built this one.

Q. When did he start the saloon business in the old *Lammlein* house? A. In 1892.

Q. And moved his business when into the new saloon building?

A. I think it was in the fall of 1892.

Q. Was he in the saloon business alone or with some one else?

A. He was in the saloon business with Dave Pritchard.

Q. Can you indicate upon this map, exhibit 1 of Bickell's testimony the townsite map, whereabouts this saloon building was built by the plaintiff?

A. Now, this is north; it is on the same side; right here.

(Testimony of Charles Forman.)

Q. On lot 8 in block 1? A. In lot 8 block 1.

Q. How long, if you know, did the plaintiff, John Trodick, carry on the saloon business in that saloon building built by him on lot 8 block 1?

Mr. LOEB.—Same objection.

A. The saloon business is carried on there to-day and ever since as far as I know.

Q. Did I understand you that the building has been used continuously for saloon purposes since its completion? A. Yes, sir.

Q. After building this saloon building, so called, in 1892, where did the plaintiff John Trodick go to live or room?

A. Why he lived there for quite awhile.

Q. In the saloon building? A. Yes, sir.

Q. What he do with the old *Lammlein* dwelling during the period he was living in the saloon?

A. He had it rented for a while to Mrs. and Mr. Bissell.

Q. And what use did Mr. and Mrs. Bissell make of the dwelling while they occupied it so rented?

A. As near as I can remember they ran a boarding-house.

Q. For how long did Mr. and Mrs. Bissell continue to run a boarding-house in the *Lammlein* dwelling?

Mr. LOEB.—Same objection.

A. Well, sir, I don't know, but it must be a year or more.

Q. When was the next building put up on this ground?

(Testimony of Charles Forman.)

A. The next building must have been the blacksmith-shop.

Q. By the way, did Mr. Albion McDonald, the defendant in this action, ever put up a warehouse?

A. Yes, sir, he put up a warehouse lower down.

Q. Do you remember when that was put up?

A. I don't remember just the year.

Q. About what year?

A. It must be 1897; somewhere in there.

Q. What was that building built for?

A. It was built for implements, part of it, and a store.

Q. Store and implement warehouse?

A. Yes, sir.

Q. Can you indicate on exhibit 1, the townsite map, where that was put up?

A. Lot 1.

Q. Of block 3?

A. Block 3—lots 1 and 2, I think.

Q. And what was that building used for after it was completed, if used for anything?

A. It was used for a store.

Q. Now, you spoke of this blacksmith-shop. Was there any residence on that ground preceding the construction of the blacksmith-shop?

A. Now, sir, I have a slight recollection of a residence there before the blacksmith-shop was built.

Q. Built by whom?

A. Shively.

Q. The residence?

A. Anyway he lived there; I don't know whether he built it or not.

(Testimony of Charles Forman.)

Q. And how early can you recall Shively being on that ground, living there? A. In '94.

Q. In 1894? A. Yes.

Q. What became of that Shively residence?

A. I think it was bought, or pulled down and bought by some man, I don't know, but it was a section-man that lived there by the name of John Erickson.

Q. Can you indicate on the townsite map, exhibit 1, where it was located?

A. It was here. (Witness indicates.)

Q. On lot 3 in block 2? A. Yes, sir.

Q. And after the Shively building was torn down or removed, what, if anything, was built in place of it on that ground?

A. Well, there was a blacksmith-shop built there.

Q. Built by whom? A. George Lloyd.

Q. And used for what purpose?

A. Blacksmithing.

Q. And what became of the blacksmith-shop?

A. The blacksmith-shop is still there, owned by Mr. Bissonette.

Q. And has been used how constantly since its construction? A. Been used ever since.

Q. For what use? A. Blacksmithing.
beside the blacksmith-shop?

Q. What other building was put up on this ground

A. Well, there was a hall built there—a public hall.

Q. How long since—how long ago?

A. About 4 years, I think,

(Testimony of Charles Forman.)

Q. By whom?

A. By a man by the name of Al Trodick.

Q. Son of the plaintiff John Trodick?

A. Yes, sir.

Q. Can you indicate upon this map the location of that hall—the townsite map, exhibit 1?

A. It is on either 4 or 5, somewhere around there.

Q. In lot 4 or 5 in block 2?

A. Yes, sir.

Q. About what was the size of that building?

A. About 24 x 50.

Q. Constructed of what material?

A. Lumber.

Q. One or two stories?

A. One story; yes, sir.

Q. What use has been made of the building since it was put up by Al Trodick?

A. Most of the time used as a dance-hall, or for meetings, or speakings, public business.

Q. Do you know of any other building put up on the ground? A. I know of a store.

Q. Put up by whom?

A. By Mr. William Reinig.

Q. In what year? A. In 1900.

Q. Its size? A. It is 24 x 50, I think, first.

Q. And afterward increased? A. Yes, sir.

Q. To what size?

A. Afterwards there was a stone building put on the side—kind of a shed for a cellar or warehouse.

(Testimony of Charles Forman.)

Q. Making the total dimensions of the building as so increased, about what? A. In value?

Q. No, the size—the ground space.

A. Well, I think it is about 80 feet long now, and then there is an L about 50 feet long.

Q. Can you indicate its location on the townsite map, exhibit 1?

A. The store is right here—lot 10.

Q. Block 2? A. Yes.

Q. It is there now? A. Yes, sir.

Q. Used for what purpose?

A. Carry on a store business.

Q. And has been used for what purpose ever since it was constructed in 1900? A. A store.

Q. Was any residence built by any of these blacksmiths?

A. Mr. Bissonette, the blacksmith, the present blacksmith, put up a residence.

Q. Built about when?

A. A year ago last fall.

Q. And located about where, if you can indicate it upon the Wolf Creek townsite map, exhibit 1?

A. Well, I think it is in 2 or 3; I am not sure which.

Q. “ or 3 in block 1? A. Yes, sir.

Q. It was completed when?

A. It was completed a year ago.

Q. And has been used for what purpose since its completion? A. A dwelling-house ever since.

(Testimony of Charles Forman.)

Q. Now, do you know of any other building put up there—any brick structure?

A. There is one put up by Albion McDonald—a brick saloon, a brick structure.

Q. Built when?

A. It was completed about a year ago this winter.

Q. And has been used and occupied by whom ever since?

A. By Mr. McDonald.

Q. And for what purpose?

A. Saloon purposes.

Q. Can you indicate upon the townsite map, exhibit 1, its location?

A. It is 9.

Q. Lot 9 in block?

A. In Block 1.

Q. About what is the size of this brick building?

A. I think it is 22 x 54; something like that.

Q. Feet?

A. Yes, sir.

Q. Could you make any estimate of the value of the second store building built by McDonald in 1892?

A. No, sir, I don't know.

Q. Or of the Trodick saloon building, built that year?

A. No, sir; I don't know.

Q. Or of the McDonald warehouse building?

A. No, sir.

Q. Or of the Reinig store building?

A. No, sir; all I know about the store building is when the addition was put on I heard the store man say it cost him about \$1,000.00.

Mr. LOEB.—The same objection; and for the further reason that it is hearsay.

(Testimony of Charles Forman.)

Q. Or of the Bissonette blacksmith-shop or residence? A. No, sir; I don't know.

Q. Or the Equity saloon? A. No, sir.

Q. Do you know where the section line between sections 35 and 2 runs in its course past this neighborhood? A. Yes, sir.

Q. Are you familiar with the location of the second corner at the southeast corner of section 35?

A. Yes, sir.

Q. And are you familiar with the location on the ground of the first quarter corner on the south line of section 35, going toward the west?

A. Yes, sir; I know where it is.

Q. And have you ever taken occasion to sight or view across from point to point, or an intermediate point to these two points that I have indicated?

A. Yes, sir.

Q. Do you feel, then, that you know where the south line of section 35 and the north line of section 2 lies on the ground? A. Yes, sir.

Q. Whereabouts, with reference to the present bridge, now spanning Prickly Pear Creek does that line run?

A. It crosses the bridge pretty nearly the center.

Q. On which side of that line is the railroad track at points opposite the ground indicated on this town-site plat, exhibit 1?

A. Which side is the railroad buildings?

Q. Yes, the railroad buildings instead of the track.

A. On the south side of that line.

(Testimony of Charles Forman.)

Q. And they are in what section?

A. In section 2.

Mr. LOEB,—Objected to as the survey of location is the best evidence; and it does not appear that the witness knows anything as to surveying.

Q. Which side of that line is the section-house of the railroad?

A. It is on the north side of the railroad.

Q. No; which side of the section line is the railroad section-house?

A. It is on the south side. All of them.

Q. And when you say all the railroad buildings are on section 2 and south of the south line of section 35, what buildings do you allude to, enumerating them?

A. I allude to the station and the water-tank, the coal-shed, the section-house and 2 or 3 more buildings in there.

Q. And the track, the railroad tracks at a point opposite the bridge spanning the Prickly Pear Creek, is in what section?

A. Spanning the Prickly Pear?

Q. The railroad track at a point opposite the bridge that spans the Prickly Pear Creek, the track is in what section?

A. In section 2.

Q. Were these railroad buildings there when you went there in 1890?

A. Yes, sir; all but the coal-shed; it has been built since, and the water-tank has been moved from another place there.

(Testimony of Charles Forman.)

Q. Was the water-tank before in section 35 or 2—before it was moved?

A. There was never no water-tank; it was 2 or 3 or four miles up the road.

Q. What have you to say as to the comparative position of the depot building when you went there in 1890 and its present location?

A. It is about the same place.

Q. Pretty nearly the same place?

A. Pretty near the same place; moved a few feet.

Q. Was it then in section 35 or 2?

A. Section 2, as near as I know. It was not surveyed then, but it came in section 2 after the survey.

Q. Fell in section 2 after the survey?

A. Yes, sir.

Q. And what have you to say as to whether the point at which the section-house was when you went there in 1890 after the survey lay within section 35 or section 2?

A. The section-house is in the same place—it may be moved a few feet one way or the other—probably 20 feet south.

Q. Well, where is it now, in which section?

A. It is in section 2; I think the line goes close to the corner of the house.

Q. And as it was when you first went there in 1890?

A. When I first went there, I think if it stayed where it was then, the line would have cut right through it and probably left the biggest part on 35.

Q. Gone right through the house?

(Testimony of Charles Forman.)

A. Yes, sir.

Q. Where was the greater part of the creek bottom as it was when you went there in 1890—in which section?

A. The biggest part, I think, was in section 2, from the creek.

Q. And where did the creek then run with reference to the mountainside?

A. It ran south of the track now.

Q. South of the present track?

A. Of the present track; yes, sir.

Q. Did you do any plowing at the request of the plaintiff, John Trodick, in the creek bottom after you went there?

A. I didn't do any in the creek bottom; I done some on the bench part.

Q. I don't mean the creekbed; I mean the bottom land on each side of the creek, in the bed of the canyon?

A. Yes, sir, I done some breaking; probably 3 or 4 acres.

Q. Did he tell you where to break it?

A. Yes, sir.

Q. What year did you break this ground?

A. I don't remember whether it was in '91; I can't remember which year; anyway, it was when I first went there. I had been there a year or two.

Q. You think in the year 1891?

A. Yes, sir.

Q. Did the plaintiff, or didn't he, point out to you the ground that he desired to have broken?

(Testimony of Charles Forman.)

A. Yes, sir.

Q. Which side of the creek as it then ran did this ground lie on? A. The south side of the creek.

Q. After the survey, did this ground that he then asked you to break lie in section 2 or section 35?

A. It was in section 2.

Q. About what area of ground did you so break at his request?

A. As near as I can tell it must have been four acres.

Q. Did Trodick himself, during that time, have any team or farming implements?

A. Not that I know of, sir.

Q. Well, what became of this ground that was then broken? A. The ground is still there.

Q. Well, what was done with it after it was broken up? A. I think they planted oats there.

Q. Planted oats? A. Yes, sir.

Q. Who was interested in that crop of oats?

A. I and my brother and Mr. Trodick.

Q. On a third basis? A. Yes, sir.

Q. Who harvested the crop?

A. I believe we hired a man to cut it with a binder, and then I and my brother hauled it and threshed it and worked it out that way.

Q. Whereabouts was the ground with reference to the Al Trodick dwellings in that flat at the present time?

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent. I understand, Mr. Wallace, that

(Testimony of Charles Forman.)

you consent to this entire line of testimony being objected to as irrelevant, incompetent and immaterial?

Mr. WALLACE.—I have not changed my mind at all. Yes, sir.

A. Well, at that time there were no dwellings there.

Q. But my question was, where was this ground that he then asked you to plow and break, with reference to the ground now occupied by the Al Trodick dwellings.

A. It is the same ground? It is right there—the same ground, only cleared off some.

Q. Part of the same ground?

A. Yes, sir, part of the same ground.

Q. Did the plaintiff, John Trodick, at any time refer to this ground that he so asked you to plow as *Lammlein's*, and if so, what was his reference in that regard?

Mr. LOEB.—Objected to as incompetent, irrelevant and immaterial.

A. Well, he told me that it was the *Lammlein* place.

Q. What extent of tillable land was there inside of and to the north of the south line of section 35 in that bottom? A. In what year?

Q. In 1890?

A. Well, there was not any that was tillable; outside there was a little that the railroad had taken.

Q. How much was there of that?

(Testimony of Charles Forman.)

A. When I first came there, there was possibly 3 or 4 acres of a garden patch fenced in there.

Q. And where was the great bulk or body of the tillable land in the bed of that canyon?

A. It was on section 2.

Q. After the railroad came along and took the ground, what was there left of tillable land in section 35 at that point?

Mr. LOEB.—Same objection.

A. Well, there may have been 3 or 4 acres after the railroad came through.

Q. What was there after the flood?

A. After the flood I didn't see any that you would call tillable land.

Q. What is the character of the land to the south of the canyon bed?

A. Well, some parts of it is gravelly and some parts of it is loam.

Q. Level? A. Some parts of it is level.

Q. How far to the south, or about how far to the south of the present creek channel did the creek flow at a point opposite the present bridge when you came there in 1890?

A. Possibly 200 feet or 250 feet from where it is now.

Q. And this ground that you plowed at the plaintiff's request was still to the south of that?

A. A little to the southeast.

Q. Did you ever have any talk with the plaintiff, John Trodick, concerning his buying lands from Auchard?

(Testimony of Charles Forman.)

A. Yes, sir; I had some talk with regards to buying lands.

Q. What was that talk?

Mr. LOEB.—Objected to for the reason that the time and place is not given.

A. Well, Mr. Trodick told me he bought his lot from Auchard. I told him I had bought some lands, and my brother bought a lot or two, and that is about the extent of the talk.

Q. What lots did you buy of Auchard?

A. I bought different lots. Of course I bought lots where we had a fence—not to intrude too much on each other. I bought parts of two (2) lots on one side and four on the other.

Q. Paying how much a front foot for them?

A. \$1.00.

Q. Was the plaintiff John Trodick there when this Auchard survey of the Wolf Creek townsite was made?

A. Yes, sir.

Q. Did you or he afterward, after the survey was made, have any talk about the survey of these lands?

A. Yes, sir; we made division lines.

Mr. LOEB.—Objected to for the reason that the time and place are not given and the parties present.

A. And agreed to put our fences on the lines.

Q. Were your fences on the lines conforming to the lot and block lines of the Auchard townsite, before this understanding between you and the plaintiff?

A. No, sir; we put them on the lines.

Q. Did it become necessary to move the fences?

A. Yes, sir.

(Testimony of Charles Forman.)

Q. And under what arrangement was that change of fence made between Trodick and yourself?

Mr. LOEB.—Objected to for the same reason, and for the further reason that is urged against the admissibility of all this testimony.

A. We agreed to put our fences on the lines according to the survey.

Q. Did you? A. Yes, sir.

Q. Who furnished the material for the fences thus put up?

A. Why, I built one division fence and furnished the material, and Mr. Trodick built the other and furnished the material—or rather I built it for him, if I remember right.

Q. What improvements did you make upon the ground covered by this written lease from Mr. Trodick, outside of the buildings?

A. I don't know; I done a whole lot levelling the ground, built up orchards and planted trees and tried to make a home there and built cellars.

Q. What was the value of your total improvements put upon that ground?

A. You mean on the whole business, with the ground and buildings and everything?

Q. No, without the ground—just the value of the improvements. A. Oh, about \$5,000.00.

Q. And the value of the improving you did on the ground, filling in the gulches, planting trees, etc.

A. Well, that was considerable; I don't know just how much.

Q. Of course you have some idea?

(Testimony of Charles Forman.)

A. Probably \$500 or \$600—that is, altogether.

Q. Did Mr. Trodick know of these improvements put upon the ground by you? A. Yes, sir.

Q. Did he ever at any time in any manner object to its being done?

Mr. LOEB.—Objected to as leading and for the same reason as urged to all of the testimony of the witness. A. No, sir.

Q. Did you have any talk with Trodick about establishing lines between you before you and he bought from Auchard?

A. No, sir; I don't know that we did.

Q. Do you remember a small garden patch up by a little spring there?

A. Yes, sir; there is a little garden patch up there, we had it for a garden for probably 4 or 5 or 6 years.

Q. About what was the size of it in feet?

A. About 40x45 or 50; something like that.

Q. From whom did you get permission to use it?

A. Got permission from Mr. Auchard.

Q. Did the plaintiff, John Trodick, know of your use of it? A. Yes, sir.

Q. Did he at any time object to it, or question your right to use it? A. No, sir.

Q. Did the plaintiff, John Trodick, ever tell you from whom he bought the claim and improvements?

A. He told me he bought it from George Houghton.

Q. Do you remember the transaction itself?

(Testimony of Charles Forman.)

Mr. LOEB.—Objected to for the reason that the time and place is not given.

A. No, sir; I don't remember any transaction between Houghton and Mr. Trodick.

Q. Do you recall having anything to do with the execution of any notes?

A. Sometime afterwards; yes. I was a witness to some notes, some two or three notes, endorsed to secure payment of the ground and improvements.

Q. Given by whom to whom?

A. Given by Mr. Trodick to Houghton.

Q. Who was Houghton?

A. George Houghton was the railroad agent at the depot at Wolf Creek.

Q. Where did he live when he was down there?

A. At the depot.

Q. At the depot station? A. Yes, sir.

Q. Did he ever live there on this land?

A. Not that I know of.

Mr. BULLARD.—I want permission to take this map for the surveyor to go down Saturday morning on the Saturday noon train to verify the measurements made. May it be understood that we can have it for that purpose?

Mr. LOEB.—Yes, sir, after we have used it in the cross-examination of the witness.

Cross-examination by Mr. LOEB.

Q. You say you were a witness to some notes from Trodick to Houghton—you don't undertake to say that these notes were to pay Houghton any money, do you? A. Why, yes.

(Testimony of Charles Forman.)

Q. You mean to say that they were to pay him some money for some land?

A. Some land and some improvements.

Q. You swear to that, do you?

A. Yes, sir; I swear to these notes that they—

Q. You swear that these notes were payable to Houghton, do you?

A. That I was a witness to those notes.

Q. You don't know who they were payable to.

A. George Houghton.

Q. You are sure they were payable to George Houghton—or Mrs. *Lammlein*?

A. To Mrs. *Lammlein*? She had left the country when these notes were made. I don't know but what she was dead.

Q. You don't know what the notes were for, do you?

A. Yes, they were for a debt due Houghton.

Q. You don't know what the debt was for, do you?

A. Yes, sir; I know the debt was for a transaction between Mr. Trodick and Mr. Houghton in regards to the *Lammlein* improvements.

Q. Now, Mr. Trodick says that Mr. Houghton acted as agent for Mrs. *Lammlein*.

A. I don't know anything about that. All I know is what Mr. Houghton told me and what Mr. Trodick told me.

Q. As a matter of fact, you are somewhat biased in this litigation, aren't you?

A. No, sir, not at all.

(Testimony of Charles Forman.)

Q. You have got some valuable improvements on the southeast quarter of section 35?

A. Yes, sir.

Q. And you bought from Mr. Auchard?

A. Yes, sir.

Q. And you are relying upon the title that Mr. Auchard gave you?

A. Yes, sir.

Q. And if the railroad company and Mr. Auchard, the defendants, fail in this case, your title will fail?

A. Well, I don't know.

Q. Well, you never bought from Trodick, did you?

A. Never had any show to buy from Trodick.

Q. The entire title that you got—you haven't any title to the land on which your hotel and building is that you have testified are situated here on section 35, other than what you got from Mr. Auchard?

A. No, sir.

Q. Now, you would like to see the defendants win this lawsuit, wouldn't you?

A. Well, I don't know—yes.

Q. Were you subpoenaed in this action?

A. No, sir.

Q. You came up here voluntarily as a witness, didn't you?

A. They asked me to come.

Q. Who asked you to come?

A. Mr. Bullard.

Q. Did Mr. Bullard ask you to come to-day?

A. Yes, sir.

(Testimony of Charles Forman.)

Q. Did he ask you to come last week when this matter was being tried?

A. No, sir; I just came of my own accord.

Q. And you are interested in this litigation?

A. Only Mr. Bullard said he would like to have us there—that is all I know.

Q. Mr. Bullard is the representative of the Auchard estate from whom you claim your title?

A. Yes, sir.

Q. Now, when you went there, was Auchard there, when you first went on section 35?

A. Was Auchard at Wolf Creek?

Q. Yes. A. No.

Q. Why was it that you asked Mr. Trodick for a lease of this land 70 x 400 feet?

A. It was because I wanted to start a little business there—a butcher-shop.

Q. How far is that piece of land from the *Lammlein* house? A. It is 150 or 200 feet.

Q. Did Mr. Trodick have it enclosed?

A. Well, there was a kind of a fence there when I first went; he put a fence there; there didn't use to be a fence there.

Q. Did you understand that Trodick owned the land at the time?

Mr. WALLACE.—Object as calling for an opinion of the witness.

A. I didn't understand only what Mr. Trodick had told me—that he had bought it from George Houghton; and Mr. Houghton told me that he had sold it.

(Testimony of Charles Forman.)

Q. And that is the reason you thought, Mr. Trodick being in possession of the land—you thought it would be necessary for you to get his permission to go on it? A. Yes, sir.

Q. And you first went on that land under permission from Mr. Trodick? A. Yes, sir.

Q. And now you are undertaking to dispute Mr. Trodick's title and insisting on the title of Mr. Auchard? ?

Mr. WALLACE.—Objected to as immaterial.

A. No, sir; I don't know anything about Mr. Trodick's title; I have *anything* to do with it.

Q. You leased from him?

A. I did then, and afterwards other men came on the section—and said it was an odd section.

Q. You didn't know at the time you leased from him that it was an odd section?

A. It wasn't surveyed then. I only knew from what the railroad people said; they said when it was surveyed it would become section 35.

Q. Who said that?

A. Parties on the railroad.

Q. They said that on the first day of February, 1891? A. It was before that.

Q. That was the first time you went there in 1891?

A. I was there in the fall of 1890.

Q. And it was that time you found Mr. Trodick on this section 35, did you? A. Yes, sir.

Q. You found Trodick occupying the land that you afterwards leased from him and put up your butcher-shop on? A. Yes, sir.

(Testimony of Charles Forman.)

Q. That was on the southeast quarter of section 35, township 15 north of range 4 west?

A. Yes, sir. That is what it is now; I don't know what it was.

Q. But you thought you would have to get his permission to go there? A. Yes, sir.

Q. Well, did you ask him for permission to put the other buildings there that you put there?

A. On the other side?

Q. Yes. A. No, sir.

Q. Why didn't you ask him for permission to put these buildings there?

A. Simply because he told me he didn't know he owned it or claimed it.

Q. That was where the railroad right of way was?

A. Yes, sir.

Q. That had previously been transferred by *Lammlein* to the Montana Central Railroad?

A. Yes; I don't know just how much.

Q. And that is the only reason you didn't ask him for permission or get a lease from him to put buildings there—was because the railroad was claiming it?

A. Well, I might have asked him just the same; but he said he didn't know he had anything to do with it.

Q. Or else you would have asked permission to build there? A. Yes, sir.

Q. Isn't it true, as a matter of fact, that everybody recognized Trodick's title down there at that time? A. Not for very long, that I know of.

(Testimony of Charles Forman.)

Q. They had up to the time that the railroad claimed to own section 35, hadn't they?

A. I don't know.

Q. Well, they all acted the same as you did, didn't they?

A. Only some of the people built there—that is all I know. I had peaceable possession to go there from the first.

Q. And the others went there without asking any permission—some of them?

A. Well, they went and built there—that I don't know.

Q. You don't know whether they asked permission or not, do you? A. No.

Q. So when you testified that Trodick didn't object to your doing something, I want to know whether you asked him for permission to do it?

A. He didn't object to my doing anything that I know of.

Q. Did you ask him for permission to do the things you have testified as having done?

A. No.

Q. You know the man is 82 or 83 years old, don't you? A. Yes.

Q. Did you expect him to come around to you every time you made a move?

A. Well, when I bought the ground from another man, I wouldn't go to ask his permission to do anything on it.

Q. Who did you buy the ground of?

A. Auchard.

(Testimony of Charles Forman.)

Q. When did you buy this ground?

A. In '97 or '98.

Q. Did you buy the ground from Auchard that you leased prior to that time from Trodick?

A. Yes, sir.

Q. Did Auchard allow you any credit by virtue of the lease you had from Trodick?

A. No; Auchard knew nothing about the lease.

Mr. LOEB.—We object to all the testimony of the witness with reference to the purchase of land from Auchard, and move to strike out all of the witness' testimony with reference to the ownership of the land or claim of the land that comes from Auchard, for the reason that the deed to witness from Auchard is the best evidence of his purchase of the Auchard right to the premises.

Q. Now, you say you did some plowing for Mr. Trodick? A. Yes, sir.

Q. Wasn't this plowing done as payment on this lease? A. Yes.

Q. That is, you plowed land for him for the right to occupy part of the land with these buildings?

A. Yes, sir; on the other section.

Q. Well, never mind about on the other section. It was part of the land that Trodick claimed, wasn't it? A. Yes, sir.

Q. And you plowed a portion of that land?

A. Yes, sir.

Q. For permission to erect your butcher-shop and buildings on another portion of it?

A. Yes, sir.

(Testimony of Charles Forman.)

Q. And how many years did you do this?

A. I leased for five years, I think.

Q. And you plowed every year for five years?

A. Done something; yes.

Q. Did something?

A. I don't think I did more than 3 or 4 years.

Q. And all that time Trodick lived on this ground, did he?

A. Yes, he lived on the other section—35.

Q. Well, he lived on all the land north of the south boundary of 35? A. Yes, sir.

Q. Just so I won't have any misunderstanding, you say he lived in the *Lammlein* house all the time except a portion of the time when he had it rented for a boarding-house, when he was living in the building he afterwards used as a saloon?

A. Yes, sir.

Q. Both the saloon building and the *Lammlein* house are on section 35, aren't they?

A. Yes, sir.

Q. So you can say without any question that all the time you were at this place there that *Lammlein* was living on section 35, either in one place or the other? A. Yes, sir.

Q. And never since the time you went there in 1891 did Trodick live anywhere else except on section 35, did he?

A. Not that I knew of. Of course he would go away for sometimes a day to work—somewhere.

Q. But he always had a home there on section 35; isn't that so? A. Yes, sir.

(Testimony of Charles Forman.)

Q. Now, you said something about going up to his house and living with him there; who was with you?

A. At the old *Lammlein* house?

Q. Yes.

A. He rented it a part of the winter to me and my wife.

Q. Did he live in the house at the same time?

A. He lived there and we kept house.

Q. You rented a portion of the house from him?

A. We rented it all.

Q. You allowed him to live there, didn't you?

A. Yes, sir.

Q. You both lived in the same house?

A. Yes, sir.

Q. Now, all the time during that winter that you and your wife were living in that house, Trodick and his son were living there?

A. Yes, sir; his son the biggest part of the time not all the time.

Q. Trodick was there all the time?

A. Yes, sir.

Q. *Trodick* had no wife or woman there at the house, had he?

A. No, sir.

Q. Your wife did the cooking?

A. Yes, sir.

Q. And Trodick boarded at your table?

A. Yes, sir.

Q. Did he always live in the *Lammlein* house during the time that you lived there?

A. Yes, sir.

(Testimony of Charles Forman.)

Q. And it was during this time that you were doing some plowing for him, was it?

A. I think it was after.

Q. After that you did some plowing for him?

A. It was the next spring.

Q. Did you ever plow any ground in section 35?

A. Section 35—I plowed up a little garden patch once.

Q. So you did some plowing for Trodick in section 35? A. Yes, sir.

Q. When did you do this plowing?

A. Oh, I don't know; I hadn't been there very long; I think it was after the washout I did that.

Q. Now, was there anybody living in that bottom, other than Trodick, when you went there in 1891?

A. No. You mean on the south side?

Q. No; I mean the Wolf Creek bottom, where these buildings are that you testified so long about.

A. In 1891 there was a railroad building there.

Q. You went there, didn't you, to open up a butcher-shop to supply the railroad *people*, didn't you?

A. No, sir; I wasn't selling meat to the railroad.

Q. Who were you selling meat to?

A. Peddled meat out in the country.

Q. You considered that a central point to operate at? A. Yes, sir.

Q. And you wanted to establish a butcher business there? A. Yes, sir.

Q. Now, when you went there, did you find anybody located on the land north of the south boundary

(Testimony of Charles Forman.)

line of section 35, township 15, north of range 4 west, other than Trodick?

A. I can't remember of anybody.

Q. Trodick was the only man that was claiming the land then north of the south boundary line of section 35, township 15, north of range 4 west?

A. Yes.

Q. And it was because of that fact that you got this lease from Trodick?

A. Yes, sir.

Q. Now, I call your attention to Complainant's Exhibit 1, introduced originally in the testimony of Bickell, which purports to be the townsite plat of Wolf Creek. This had not been platted as a townsite, this land, when you went there in 1891, had it?

A. No, sir.

Q. And you found no one in the occupancy of any of this land covered by this townsite plat, when you went there, other than Trodick?

A. The railroad.

Q. The railroad, as I understand it, was south of this section ilne?

A. But they were claiming both sides of the road.

Q. You mean to say that the railroad was claiming a portion of the land north of the south boundary of section 35?

A. They was claiming right to the old Benton road—right to where the old log fence was.

Q. Then the railroad claimed land that is north of the south boundary of section 35, township 15, north of range 4 west?

A. Yes, sir.

(Testimony of Charles Forman.)

Q. Did it have its tracks north of the line at that time? A. Its tracks were south of that line.

Q. How far south of the line?

A. Well, probably 100 feet or 150 feet in some parts of it.

Q. And they claimed land how far north from their tracks?

A. Possible 200 feet, to the Benton road.

Q. Then, as a matter of fact, the railroad did actually claim some land in section 35?

A. Yes, sir; I only know what they told me.

Q. Did you see their tracks in section 35?

A. No; not the railroad tracks.

Q. Did you see any of their buildsings in section 35, other than the section-house you spoke of?

A. No, sir; I didn't.

Q. The men living in the section-house didn't undertake to do any farming there, did they?

A. No, sir.

Q. So that, as a matter of fact, when you went there in 1891 other than the railroad claim, the only claim to any of this land covered by this Wolf Creek townsite was the claim of Trodick?

A. Yes, sir.

Q. He was the only one living there other than the railroad people? A. Yes, sir.

Q. How far north of section 35—of the south boundary line of section 35, township 15, north of range 4 west, does this townsite extend?

A. How far does it extend?

(Testimony of Charles Forman.)

Q. Yes.

A. You mean east and west?

Q. No, north and south.

A. Well, the townsite is right here—it don't extend any further than the lots.

Q. Well, what is the character of the land north of the lots as platted on that townsite?

A. Why, it is just mountains.

Q. Runs up against the bluff there?

A. Yes, sir.

Q. Good for pasture, is it?

A. Why some of it; and some of it is not good for anything.

Q. It has been used for pasture, has it?

A. It has been used for pasture, some.

Q. Did you ever use it for pasture?

A. I used some of it; there is a kind of basin and spring there.

Q. Who did you get permission to use that from?

A. I didn't get permission from anybody.

Q. You simply used that; didn't get that from Auchard?

A. I ran a little fence around it and used it for some horses that I had.

Q. Now, does pasture land adjoined to meadow land depreciate its value at all?

A. Why, I don't know; there was no meadow land there.

Q. Well, assume there was some meadow land in the bottom down there in 1891.

(Testimony of Charles Forman.)

A. Yes; the other side of the creek there was a little.

Q. Well, the pasture to the north wouldn't depreciate the value of the place as a farm, would it—the *Lammlein* place? A. No.

Q. What did you say Trodick's arrangement was with you when you were boarding at his house?

A. Well, the nearest I can come from my recollection is that it was to board Mr. Trodick and pay him \$6.00 a month.

Q. Then you got permission to live in his house with yourself and your wife, and for that right you agreed to let him live at your table on the payment of \$6.00 a month; is that correct?

A. Yes; gave him six dollars and his board.

Q. Did you pay the six dollars, or did he pay the six dollars?

A. I paid the six dollars; that would be in the neighborhood of thirty dollars.

Q. Did you pay Trodick six dollars a month and board for the right to live in his house that winter?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir; as near as I can remember.

Q. How long were you living in the house under this arrangement by which you were to pay him six dollars a month and his board?

A. I think I lived there 2 or 3 months, probably four; I can't remember.

(Testimony of Charles Forman.)

Q. And then why did you cease living there? Did you build your house on the land you had leased from him?

A. Yes, I had finished the building.

Q. Now, the lease which you got from Trodick, Defendant's Exhibit "I," is dated correctly, is it, on the 1st day of February, 1891?

A. Yes, sir.

Q. And in that lease you agreed to pay the sum of \$20.00 per annum, payable in advance?

A. Yes, sir.

Q. Now, this receipt, Defendant's Exhibit A-2, is dated February 1st, 1891; is that correctly dated?

A. Yes, sir.

Q. You say you saw it written?

A. Well, I don't know whether I saw it written or not. My brother wrote it there and it is in his writing; that I will swear to.

Q. But other than the fact that this is his writing, you won't swear to anything with reference to it, will you?

A. I will swear it is his writing.

Q. That your brother wrote this receipt?

A. Yes, sir.

Q. You will also say he wrote it on the date it purports to bear?

A. Yes, sir.

Q. You don't recollect now, or you are not positive now that you saw Trodick sign that?

A. Yes, sir, I am pretty sure I saw him sign that.

Q. You saw him sign it, you say?

A. If I remember right, we were both together; but it is so long since I can't remember these little things.

(Testimony of Charles Forman.)

Q. But this twenty dollars that this receipt purports to be a receipt for, which is signed, you say you saw Mr. Trodick sign? A. Yes.

Q. That was the first twenty dollars that was due under this lease wasn't it? A. Yes, sir.

Q. Now, that is the only cash that you ever paid Mr. Trodick, isn't it?

A. Well, I don't know that that was cash; it was money or its equivalent.

Q. But that was for the first year and it was paid when this lease was executed? A. Yes, sir.

Q. Are you sure that you ever paid Trodick any money? A. I am not sure—no.

Q. Isn't it more likely, Mr. Forman, that you paid for this lease in work and labor and plowing for Mr. Trodick on his location there than that you paid in money?

A. Not very much plowing; there was lots of things I did outside of plowing.

Q. What did you do outside of plowing?

A. Done whatever he wanted done with a team.

Q. What did he have you do with the team?

A. I can't very well remember just what he had me do; there is a dozen and one things a man can do with a team.

Q. Now, all this work that was done with a team on this Trodick location was done as compensation to Trodick for the use of this ground?

A. The biggest part of it; yes, sir.

Q. And over what space of time were you furnishing labor and your team to Trodick?

(Testimony of Charles Forman.)

A. Oh, I don't know.

Q. Well, it began February 1st, 1891, didn't it?

A. Yes, sir.

Q. How long after that—how many years?

A. Well, I didn't have so much to do but that anything Mr. Trodick wanted done I would do it.

Q. Did you ever build any fencing for him?

A. I don't remember building any fences.

Q. Did you ever at any time build any fence for him?

A. After the townsite was laid out, I helped him build some fences.

Q. Other than that time, did you ever haul any posts for him?

A. I don't remember of my having done it.

Q. Did you ever do any work around the *Lammlein* house for him?

A. Well, sir, I don't know; I might have done it but I can't remember.

Q. But continuously during your occupation of this land that you were leasing from Trodick, you were using your team upon other portions of that land for him?

A. Yes, sir.

Q. And that is the way you paid him for the right to live there?

A. Yes, if I remember right. If it wasn't a day or two I would pay him—we used to figure it out.

Q. But you haven't any other receipts, other than this one we have here?

A. No.

Q. Who was this man Guthrie?

(Testimony of Charles Forman.)

A. He was a contractor for the Montana Central Railway Company.

Q. What contract did he have?

A. He had a contract through the Prickly Pear canyon there to rebuild the road.

Q. That was when? A. In 1892.

Q. And what arrangement did you say you had with Guthrie?

A. He had a team there and he told me that he would see the superintendent and he wanted me to put up a barn on that land. He said, "You go ahead and put up a barn; I want a place to put my horses." He said, "It will be all right with the superintendent."

Q. Now, where did you put this barn that you said Guthrie spoke to you about?

A. I put it right opposite my dwelling.

Q. Well, but on what lot in this barn located?

A. It is on lot 7.

A. Of what block of the townsite plat?

A. Well, it went up on 7 there, I think. It lapped on 6. The barn would be here—seven and six.

Q. How far north of the railroad track did you put this barn on lots 6 and 7 of block 2?

A. North of the railroad? Well, it must be two or three hundred feet—between something like that.

Q. Did you ask Trodick's permission to put that barn there? A. No, sir.

Q. Did you get permission from Auchard?

A. No, sir.

(Testimony of Charles Forman.)

Q. You got no right, then, to build that barn except the right that the railroad contractor Guthrie, who wanted a place to put his teams in, gave you?

A. Yes, afterwards I got a right, after I found that they didn't have the ground.

Q. You found out afterwards that the railroad didn't have the ground?

A. After it was surveyed, Auchard came around and owned this land.

Q. Auchard said he owned the land?

A. Yes, sir.

Q. Then you realized that the permission Guthrie gave you didn't amount to much?

A. Yes, sir, I did.

Q. Then you made arrangements with Auchard for the purchase of this lot, did you?

A. Yes, sir.

Q. And when was that—when was it that you abandoned the claim that you had to the land, that you obtained from Guthrie and made arrangements with Auchard for that land?

A. As soon as I found out they had nothing to do with it outside of a railroad right of way.

Q. When did you find that out?

A. It must be '96 or '97 or a little before that; probably '94 or '95—when I found out they didn't have it.

Q. What arrangement did you make with Auchard for that lot?

A. Just simply a contract with Auchard for the lots that I had.

(Testimony of Charles Forman.)

Q. What was the contract?

A. The contract was so much a foot for this land.

Q. And other than the contract that you had from Auchard and the permission you got from Guthrie, you didn't get any right at all to put any stable or buildings on lots 6 and 7 of block two?

A. No; the ground was there and I just simply built them there.

Q. But you never asked Trodick for any right to put anything on there?

A. No; I didn't have to ask Trodick, because he didn't know whether he owned it or not. At that time Mr. Trodick never claimed to me that he did own it.

Q. You knew, didn't you, that Trodick was there claiming the *Lammlein* land, didn't you?

A. Yes, but I didn't know what *Lammlein* sold to the railroad or bargained for.

Q. You knew, didn't you, that outside of the land that *Lammlein* had sold to the railroad, that Trodick had all the land that *Lammlein* had there or claimed there, didn't you?

A. He was claiming such.

Q. You knew, too, that by reason of the fact that you plowed land south of what afterwards proved to be the south boundary line of section 35, township 15, north of range 4 west—you knew, too, didn't you, that the *Lammlein* claim extended over the south boundary line of section 35, township 15, north of range 4 west?

(Testimony of Charles Forman.)

A. I knew it was supposed to then; that was all I knew.

Q. Did you make any arrangement to purchase from Auchard prior to 1896?

A. Well, I can't remember just when it was; it was as soon as he told me he was going to get this railroad land.

Q. Now, what did Auchard tell you about his arrangements with the railroad company?

A. He told me that if he got this land, "I will do what is fair to everybody and you can stake out your land;" and he told me long before he got his deed that he had already contracted for this land and was going to get it.

Q. What did he mean by saying he was going to do what was fair?

Mr. WALLACE.—Objected to as calling for the witness' interpretation of language of some one else, and that person deceased.

Q. What did you understand Auchard to mean by saying that he would do what was fair?

Mr. WALLACE.—Same objection.

A. What was fair between man and man.

Q. Well, you had built these buildings on the land under permission that you say you got from Guthrie?

A. Guthrie wasn't in it at all; this deed didn't cut any figure with Guthrie.

Q. Did Auchard represent to you that he owned the land alone? A. Yes, sir.

Q. Did he give you a deed for the land then?

A. He gave me a contract for what land I bought.

(Testimony of Charles Forman.)

Q. Have you got that contract?

A. Yes, sir.

Q. Will you produce it?

A. I left it home.

Q. Will you get it and produce it?

A. I will.

Mr. LOEB.—Have you any objection to the production of the contract?

Mr. WALLACE.—I am not concerned with it.

Mr. LOEB.—I will ask the witness to produce the contract that he has with Auchard with reference to the land.

Q. Did Auchard assure you that he would guarantee you against any claim of Trodick's?

A. Yes, sir.

Q. What did he tell you about that?

A. I don't know. He told me he had brought the land and paid for it and got a deed for it, and that it was all right.

Q. What did he say about Trodick claiming the land?

Mr. WALLACE.—Objected to as not cross-examination.

A. I don't know what he said about Trodick claiming the land.

Q. He knew that Trodick did claim it, didn't he?

Mr. WALLACE.—Same objection.

Q. He knew that Trodick had been claiming it and he told me that Trodick had bought ground from him the same as I had.

Q. You say at that time—that was prior to 1896?

(Testimony of Charles Forman.)

A. Why, I think it was '97 or '98 when Auchard gave us our contracts; it was two years before that, if I remember right, that he got this land and spoke to me about the land, but I had been told before building that it was railroad land.

Q. And that is the reason you were ignoring Trodick's claim—was it because you had heard it was railroad land, and you went to see Auchard about it, inasmuch as Auchard had gotten the contract from the railroad?

A. Yes, sir.

Q. When did the people first begin to say that it was railroad land—that the land that Trodick had there or had claimed there, the *Lammlein* claim—when did people first begin to say it was railroad land?

A. I think that was right after the survey in '92.

Q. Then after 1892 down there at Wolf Creek, Trodick's claim to the land was being ignored by you and McDonald and Bissonette and the people down there?

A. Yes, sir.

Q. Did you look entirely to Auchard?

A. No; that spring we didn't and for some time after that. We didn't know whether it would become railroad or Government land, or what it was.

Q. Well, it was because you believed it was Government land that you absolutely ignored Trodick's claim to it; isn't that it?

A. No, I didn't believe it was Government land.

Q. You didn't believe it was Government land?

A. No; not when they told me it was section 35.

(Testimony of Charles Forman.)

Q. You say when they told you it was section 35 and it was railroad land, you and the people at Wolf Creek, McDonald and those other parties whom you testified as to having built buildings on this townsite, ignored Trodick's claim to the land entirely and were looking entirely to Auchard? A. Yes, sir.

Q. It was because it proved to be section 35 and a railroad section that you ignored Trodick's claim?

A. Yes, sir; and because Auchard got it and sold it to us.

Q. And that was the reason that you ignored the Trodick claim there? A. Yes, sir.

Q. And didn't ask him for permission to put up these buildings there because you believed it was on section 35, and that section 35 was a railroad section, and that Trodick didn't have any claim to it for that reason. A. Yes, as far as I know.

Q. That is the theory on which you acted, isn't it?

A. Yes, sir.

Q. Now, did Auchard claim any land south of the south boundary of section 35, township 15, north of range 4 west? A. Any land the south side?

Q. Yes, did he claim the quarter section immediately south of the southeast quarter of section 35, township 15, north of range 4 west?

Mr. WALLACE.—Objected to as not cross-examination. A. No, sir.

Q. He did not? A. No, sir.

Q. Did Auchard claim lots 1 and 2 in the south half of the north quarter of section 2, in township 14 north of range 4 west of the principal meridian

(Testimony of Charles Forman.)

of Montana—it is the land that Alfred J. Trodick is alleged to have attempted to enter as a homestead?

Mr. WALLACE.—Objected to as not cross-examination and hearsay. A. No, sir.

Q. Auchard confined his claim, then, to what is described as the southeast quarter of section 35, township 15, north of range 4 west?

Mr. WALLACE.—Same objection.

A. Yes; he didn't go over the township line south.

Q. Never claimed anything south of the south boundary line of section 35, township 15, north of range 4 west?

Mr. WALLACE.—Same objection.

A. No, sir, never claimed anything south of that line.

Q. And all of the titles really that you got from Auchard was for land located north of the south boundary of section 35, township 15, north of range 4 west?

A. Yes, sir.

Q. Is that true of Albion McDonald's house—Mr. Albion McDonald's warehouse there built north of that line and on land that Auchard claimed by virtue of buying a railroad section? A. Yes, sir.

Q. That is true of the Shively house, isn't it, who built a residence there, you said, in response to a question by Mr. Wallace? A. Yes, sir.

Q. Every house, then, Mr. Forman, that you spoke of as having been built upon the southeast quarter of

(Testimony of Charles Forman.)

section 35, township 15, north of range 4 west, and particularly as having been built upon the land that was platted by Auchard as the townsite of Wolf Creek—

A. Yes, sir.

Q. Were all built on land north of that south boundary of section 35?

A. Yes, sir.

Q. And all built under permission of Auchard?

A. Well, I don't know that they were all built under permission of Auchard; the biggest part of mine was built under the permission of Auchard; the biggest part of my improvements.

Q. That is the improvements that you made after Auchard claimed the land and after it proved to be section 35—you had obtained permission, prior to that, from Trodick to build a portion of them, hadn't you?

A. Yes, prior to that—when I first went there.

Q. But all of these builders who put buildings up there, did they all ignore Trodick's claim because Auchard was claiming the land as a railroad section?

Mr. WALLACE.—Objected to as not cross-examination and calling for a conclusion of the witness.

A. I don't know.

Q. Where was it that you said the *Lammlein* house was situated on this plat?

A. I believe I said on 2 and 3 or 4.

Q. Please describe it again.

A. I think it would be on 3 and 4.

Q. The *Lammlein* house would be on lots 3 and 4 of block 4?

(Testimony of Charles Forman.)

A. Yes, sir, in lots 3 and 4 of block one.

Q. Now, where was it that you built your first building there in 1891?

A. Right here. I couldn't tell whether it is part on six and seven, or all on 7 of block 1.

Q. What was the *chracter* of the land south of the *Lammlein* house towards the creek at that time?

A. Well, it was all trees, as near as I can remember, south of the *Lammlein* house and gravel.

Q. South and east of your place, what was the character?

A. South and east of my place; brush very much and trees.

Q. Where was *Lammlein's* garden?

A. Well, his garden lay up in the mountains, probably six to eight or nine hundred feet on the mountainside—the little garden we are speaking of, you mean?

Q. That *Lammlein* had?

A. Yes, sir; that is the one. I don't know whether it was two or three hundred feed, but I am just making a rough guess.

Q. It was in the neighborhood of eight or nine hundred feet from *Lammlein's* house to his garden?

A. Yes.

Q. And his garden was north of his house some nine hundred feet? A. A little north—yes, sir.

Q. Now, *Lam,lein* and Trodick, you say, claimed some land south of the south boundary line of section 35, township 15, north of range 4 west—where the depot was? A. Yes, sir.

(Testimony of Charles Forman.)

Q. Well, now, all of the land from *Lammlein's* garden on the north, which was about eight or nine hundred feet north of his house, to the land that he claimed south of the south boundary line of section 35, township 15, north of range 4 west was included in the *Lammlein* claim there?

A. Yes, sir; section 35.

Q. Well, there was no other claim between the garden on the north and the railroad tracks on the south other than *Lammlein's*, was there?

A. Not that I know of.

Q. That was the condition of affairs in an easterly and westerly direction also, wasn't it?

A. Yes, sir.

Q. How far easterly and westerly?

A. The claim?

Q. Yes. A. Oh, I don't know.

Q. Well, it ran beyond the bridge, didn't it?

A. East and west—well, it was about half a mile—you mean that they were claiming?

Q. Yes. So then, taking a tract of land about half a mile east and west, and from the *Lammlein* garden north and south to below the railroad tracks, that tract was the *Lammlein* claim, was it?

A. As near as I know that would be it—about half a mile.

Q. How much land north of the garden did *Lammlein* claim?

A. I don't know that he claimed any.

(Testimony of Charles Forman.)

Q. Where was the garden situated—up on the hillside?

A. Yes, sir. You mean the little garden I spoke of?

Q. Yes, sir. You don't know of his claiming anything north of that. Did he ever turn in any horses there? A. I don't know. I wasn't there then.

Q. Would a line drawn north of the garden and parallel with the south boundary of section 35, township 15, north of range 4 west—would that include all of the Auchard townsite of Wolf Creek?

A. Why, yes.

Q. It would take everything in, wouldn't it?

A. Yes.

Q. Would take in all of the buildings that you spoke of? A. Yes, sir.

The EXAMINER.—We will now adjourn until ten o'clock Monday morning, January 16th, 1905.

(Hearing resumed.)

(1-16-05) . .

Q. Who is Albion McDonald, Mr. Forman?

A. Albion McDonald lives at Wolf Creek.

Q. He is a son of Angus McDonald?

A. Yes, sir.

Q. And Angus McDonald is the man Trodick testified to having had a fight with when he undertook to put up his building? A. I don't know.

Q. Albion McDonald has been there all the time, hasn't he? A. Yes, pretty much all the time.

Q. Living with his father?

(Testimony of Charles Forman.)

A. No; his father was there first, and then his father died and he came; he was away at the time his father died.

Q. Was he there before his father died?

A. Yes, he was there before, if I remember right.

Q. When did his father die?

A. In '94, I believe.

Q. And whatever right Albion McDonald has there comes from his father, Angus McDonald?

Mr. WALLACE.—Objected to as calling for an opinion of the witness upon evidence.

A. I don't know.

Q. Did you ever know of any quarrel between Angus McDonald and Trodick?

A. No, I don't remember of any.

Q. About building a building there?

Mr. WALLACE.—Objected to as not cross-examination.

A. No.

Q. You didn't know of it, then?

A. Between Trodick and Angus McDonald—a quarrel?

Q. Yes. Over building a building on this place.

Mr. WALLACE.—Same objection.

A. I can't remember. There was some little scuffle, but I don't remember anything about it; something about a building. It was the first log building, if I remember right.

Q. Do you know what year that was in?

A. I believe it was in '91.

(Testimony of Charles Forman.)

Q. Now, which is this first log building that you speak of—

A. Either in '91 or '90, I am not sure.

Q. This first log building that you speak of that was involved in this scuffle—is that building now occupied by Albion McDonald?

Mr. WALLACE.—Same objection.

A. Yes, sir—he owns that same building.

Q. Was there ever any survey made of the townsite of Wolf Creek, other than the Auchard survey?

A. Not that I know of—that is, outside of the line run through there in '91, I believe.

Q. Who ran the line in '91?

A. I think it was Bickell.

Q. The line in '91 that you speak of was the Government survey?

A. Yes, sir.

Q. But there never was any survey of the townsite?

A. Not that I know of.

Q. Around Wolf Creek, except the one that Auchard made, relying upon his railroad title?

A. Not that I know of, sir.

Q. So that the only means you have of ascertaining on what lot or block these buildings were that you testified about is from reference to this survey that Auchard had made?

A. Yes, sir, the townsite—the plat—that is what we go by.

Q. And this townsite plat was the plat that Dave Auchard had made?

A. Why, yes; I don't know of any other.

(Testimony of Charles Forman.)

Q. Trodick never undertook to plat the townsite, did he? A. Not that I know of.

Q. Did any one ever undertake to enter the townsite on the ground that the present town of Wolf Creek is located on, other than David Auchard?

A. Not that I can recall.

Q. And David Auchard got his title from the Northern Pacific Railroad Company?

Mr. WALLACE.—Objected to as calling for a conclusion.

A. Yes, sir. That is what he told me.

Q. He made no claim to the townsite there from any other source, other than the Northern Pacific Railway Company?

A. No. He bought the section and then surveyed the townsite; that is all I know.

Q. And then began to sell lots on the old *Lammlein* place. He bought the section, surveyed the townsite and then began to sell lots on the old *Lammlein* place? A. Began to sell lots on the section.

Q. He never sold lots on any place other than the old *Lammlein* place, did he?

A. Not that I know of; he would have sold lots half a mile up the creek if the town of Wolf Creek wanted to buy it.

Q. But nobody was desirous of buying any other place except on section 35 where the present town of Wolf Creek is located?

A. Not that I know of.

Q. There is where he did the most business—where the present town of Wolf Creek is located?

(Testimony of Charles Forman.)

A. Yes, sir.

Q. There is where the people were buying lots?

A. Yes, sir.

Q. Did you say Shively bought a lot of him there?

A. No, sir; he never bought any lot that I know of.

Q. Did Lloyd buy one?

A. He had bargained for one.

Q. From Auchard?

A. Yes. I don't know whether he bought it. He bargained for it.

Q. And Reinig, did he buy from Auchard?

A. Reinig? I don't know.

Q. William Reinig?

A. No, he bought from me.

Q. And you bought from Auchard?

A. Yes, sir.

Q. And it was bought from you. What right you got from Auchard you sold to Reinig?

A. Yes, sir.

Q. How about Bissonette?

A. I don't know anything about Bissonette's dwellings.

Q. You had got permission, hadn't you, or asked permission from Johnson, the superintendent of the railroad, to erect some buildings down there?

A. Yes; the time of the washout.

Q. That was when? A. That was in '92.

Q. Where did you put those buildings?

A. Put them right close to the hotel.

(Testimony of Charles Forman.)

Q. You were then up close to the railroad right of way—the ones that you got permission from Johnson to raise.

A. Well, as I stated before, they were claiming that for a right of way then.

Q. Didn't you know that *Lammlein* had sold to Judge Eddy a right of way through there for the Montana Central Railway?

A. All I knew was that the company had bought a right of way through there.

Q. And you knew that the company had bought this right of way through there from *Lammlein*?

A. No, sir, I didn't know who they bought it from; I wasn't acquainted enough with *Lammlein* at that time for to know anything about it.

Q. Did you consult the records to ascertain from whom they bought? A. No, sir.

Q. But it was by virtue of your knowledge that they had bought a right of way through there that you applied to Johnson, the superintendent of the Montana Central Railway Company, for the right to erect buildings on that right of way?

A. Yes, sir.

Q. Did Johnson tell you that they had a right of way through there?

A. No, sir; he didn't say particularly. He didn't say whether they had or had not. He says, "You are all right here; go ahead and furnish the beef."

(Testimony of Charles Forman.)

Q. He was anxious to have you there to furnish the beef?

A. Well, I got a contract from Foley Bros. & Guthrie to furnish beef on the railroad at the time of the washout.

Q. They were then engaged in contracting and employing a good many men through there?

A. Yes, sir.

Q. And it was consequent upon that that you asked them for the right to erect buildings on the right of way?

A. Yes, sir.

Q. So you would be handy to furnish beef?

A. Yes, sir. They didn't give me any papers; they just said it would be all right.

Q. That was so you would be handy to furnish beef to the contractors?

A. Well, yes, I suppose so.

Q. And these two buildings, you say, were not erected on the land you leased from Trodick but on the ground that the railroad had gotten the right to build over?

A. Yes, sir—which they were claiming at the time. We didn't know; only just hearsay from them, as far as that goes.

Q. And these buildings that you built on this—that you got permission from Johnson to build, were they north of the south boundary line of section 35?

A. Yes, north of the south line; yes, sir.

Q. They were in section 35 then?

A. Yes, sir.

Q. Not in section 2? A. No,

(Testimony of Charles Forman.)

Q. That is, what you alluded to as the second butcher-shop and stable that was put up, and which you marked yesterday on the plat?

A. Yes, sir.

Q. That was used in Mr. Bickell's testimony?

A. Yes, sir.

Q. You didn't know, you say, at that time, that *Lammlein* had sold the right of way to the railroad company?

A. No, sir, I wasn't in that part of the country when the railroad went through there.

Q. Can you indicate, Mr. Forman, by lots and blocks where the second butcher-shop and stable are that you had put up? A. Lot 7.

Q. That is what you designate as the second butcher-shop and stable was on lot 7 of block two of what is indicated as on the Auchard townsite, or the townsite plat of Wolf Creek.

Mr. WALLACE.—Excuse me, but you have got the map turned around. Here is the creek; the railroad depot is here; and the buildings are all over here.

Q. That is correct, is it, then, Mr. Forman?

A. The butcher-shop. I can't just tell whether the barn might be part on 8 and part on 7.

Q. Whether on part of 8 or part on 7, both the second butcher-shop and the stable are all on lots 7 and 8 in block 2 of the Auchard townsite to Wolf Creek. A. Yes, sir.

Q. And these are north of the south boundary line of section 35, township 15, north of range 4 west?

(Testimony of Charles Forman.)

A. Yes, sir.

Q. Now, is the railroad track south of the south boundary line of section 35, township 15, north of range 4 west, opposite lot 2 of block 2, as at this point?

A. Well, it crosses the railroad and a part of it would be north and a part of it would be south.

Mr. WALLACE.—I would suggest, Mr. Loeb, that we are going to have an exact survey made of this whole matter, covering the whole thing; and we will have the survey here showing the exact measurements of the track and they will be put on the map.

Q. There was a change in the railroad tracks at the time of the flood, Mr. Forman?

A. There was a little—yes.

Q. And also a change in the creek, in the line of the creek?

A. Yes, sir.

Q. What occasioned the change in the creek?

A. Why, because there was a washout there and it partly washed out the creek and the balance of the way the company made the creek; that is this side of the line—the north side of the line.

Q. So that for the entire length of distance north of the south boundary line of section 35, there was a change more or less in the railroad track and the creek at the time of the flood?

A. Yes, sir.

Q. You never made a survey of this land down there at Wolf Creek?

A. No, sir.

Q. And all your testimony with reference to the matter is largely approximation, isn't it?

(Testimony of Charles Forman.)

A. Well, yes.

Q. That is, you wouldn't undertake at all to testify as to exact distances? A. No, sir.

Q. And whatever you have said as to distances and locations has been approximately the distances and locations as near as you could judge?

A. Yes, as near as I could guess—yes, sir.

Q. What would you say as to the value of the land and improvements located on the Auchard town-site of Wolf Creek? A. I don't know.

Q. Would you say it was more than \$1,000.00?

A. Yes, sir.

Q. Would you say more than two thousand dollars? A. Yes, sir.

Q. Would you say more than three thousand dollars? A. Yes, sir; certainly.

Q. More than four thousand dollars?

A. Yes, sir, more than ten thousand dollars, if you want to put everything in.

Q. When you say put everything in, what do you mean?

A. I can't tell what a store is worth, or anything like that, or I can't tell what another man values his building at but everything included.

Q. Now, did Mr. Trodick ever tell you that the lands south of the railroad track there would be a good place to file on when you were building there, suggesting that you file on the place, and that you said it wasn't surveyed and didn't want to do it?

A. Not that I know of; I can't remember.

(Testimony of Charles Forman.)

Q. Didn't you and Mr. Trodick and your brother plow that vacant land south of the railroad track on shares of one-third each?

A. We had it on shares, but I don't know just whether it was one-third or what it was.

Q. The plowing that you did over there, each of you took one-third, didn't you, of the crop?

A. I don't know; it may have been so.

Q. You were in together on the plowing of that land south of the railroad track? A. Yes, sir.

Q. And all three of you looked after the raising of the crops on there?

A. Yes. That is, we sowed the oats—I think it was oats and we let it grow until we cut it; that is about all that was done to it that I can remember of.

Q. And then divided up equally the profits?

A. Yes, sir; when we threshed them.

Q. There was no fence around that land, was there? A. Some fence, yes, sir.

Q. It was surrounded by willows, wasn't it?

A. Yes, there was a whole lot of brush and trees there.

Q. It seemed to be a good place to put in a little crop there?

A. Yes; there was a little piece inside where we put in a little crop.

Q. And it occurred to you that it was a good place to put in a little crop there? A. Yes, sir.

Q. And the three of you went in together and raised a little crop on that place? A. Yes, sir.

(Testimony of Charles Forman.)

Q. Now, when Trodick had his house rented to Mrs. Bissell, which was a few months, as I understand it from you, during that time he was living on the land, wasn't he?

A. On which land do you mean—the north side or the south side of the land?

Q. On the north of the south boundary line of section 35, the *Lammlein* place.

A. Yes, he was living on the north side, if I remember right; he had a saloon there.

Q. He never was off the land during the time he rented the original *Lammlein* house to Mrs. Bissell?

A. Well, I don't remember. Outside of being out of work somewhere, I don't believe he was.

Q. There was a time, wasn't there, when he had a little saloon in this old *Lammlein* place?

A. Yes, sir.

Q. Wasn't that during the time that he was building the place he is now using as a saloon?

A. I think it was.

Q. And then when he built his present place, he moved over there and lived?

A. Yes, sir.

Q. And while Mrs. Bissell, you say, had the place, he was living in the place where he now lives—or was it in the place where he now runs his saloon?

A. No—he lived in the saloon that he is now running.

Q. While Mrs. Bissell was living in the old *Lammlein* house?

A. Yes; I think that was it.

(Testimony of Charles Forman.)

Q. Now, outside of Mrs. Bissell and yourself, that you testified to, no one but Trodick has ever lived in the *Lammlein* house?

A. No, I don't remember of anybody else.

Q. And Trodick was living there all the time that you were there?

A. Yes, Mr. Trodick boarded with me.

Q. You can't testify—or you don't know, do you, whether Shively, or LLoyd, or Reinig, or Bissonette, asked Trodick for permission to put up their buildings?

A. No. I could testify that Mr. Reinig never did.

Q. Because he got whatever permission he got from you? A. Yes, sir.

Q. And you got your right from Auchard and from Trodick under this lease? A. Yes, sir.

Q. Now, when did this land, the old *Lammlein* place, first become valuable for town purposes?

A. I don't know; it must have been about '92.

Q. And about the time you moved there?

A. I moved there in the fall of 1890, I think.

Q. And it wasn't until 1892 that it began to become valuable for townsite purposes, or town purposes?

A. Well, as far as that goes, it was valuable for a man to make a living when I first went there for business purposes.

Q. Of course that is the idea you had in mind when you rented from Trodick.

A. Yes, sir.

(Testimony of Charles Forman.)

Q. But in 1892 you say it began to become valuable for town purposes? A. Yes, sir; some.

Q. Other people began to build there?

A. Yes, sir.

Q. What was the occasion of this land becoming valuable for town purposes?

A. Well, I don't know, outside they wanted to start a store there, to make a little town.

Q. Well, the country was settling up around there, was it?

A. The country was settling up some, or had settled.

Q. And the railroad had built a depot there?

A. Yes, sir.

Q. When did Auchard first tell you that he had contracted with the railroad to get this land?

A. I think it was about 2 years before he sold it; two or three years, I am not sure.

Q. When did he sell it? Let's fix this date.

A. In '98, I think.

Q. And it was about two or three years before that that he told you he had arranged to buy the land from the railroad; that it was an odd-numbered section? A. Yes; or was arranging.

Q. Do you know whether Mrs. *Lammlein* lived longer than *Lammlein*?

A. Mrs. *Lammlein* lived longer.

Q. *Lammlein* died on the land north of the south boundary line of section 35, township 15, north of range 4 west, didn't he?

A. Yes, sir; died in the old house.

(Testimony of Charles Forman.)

Q. Mrs. *Lammlein* was living there when he died?

A. Yes, sir.

Q. How long after *Lammlein's* death did Mrs. *Lammlein* continue to live there?

A. I don't know; she lived there quite a little while; I don't know just how long.

Q. Did she continue to live in the old *Lammlein* house?

A. Yes, sir.

Q. Did Trodick live there then?

A. No, sir; Trodick didn't live there while Mrs. *Lammlein* was there—not that I know of.

Q. You wouldn't say positively as to that?

A. I can't remember of his being there when Mrs. *Lammlein* was there.

Q. You can't remember of his being there, but you wouldn't say positively that he wasn't there at the same time?

A. No.

Q. Who was this man Houghton—he was agent of the Great Northern Railroad there—he had no location there?

A. No, sir, he was the railroad agent at the station for the Montana Central.

Q. He was operator, wasn't he?

A. He was agent.

Q. Wasn't he also the telegraph operator?

A. Yes, sir.

Q. In the employ of the railroad company?

A. Yes, sir.

Q. And his residence was at the depot?

A. Yes, sir.

Q. Lived right in the depot, did he?

(Testimony of Charles Forman.)

A. Yes, sir.

Q. How long was he down there?

A. Why, I don't know; he was down there quite a while; I don't remember how many years.

Q. When did you first hear that he was there?

A. A. Well, I think he was there about as soon as the road was.

Q. And stayed there how long?

A. He was there in '88, I think.

Q. He was there in '88 or '89?

A. '88 or '89; I am not sure.

Q. Did you know him before you went there yourself?

A. I didn't know Houghton before he was at Wolf Creek.

Q. I say you knew Houghton was at Wolf Creek before you went there? A. Yes, sir.

Q. Now, this entire town sprung up at Wolf Creek after you went there? There was no town there when you went there? A. No.

Q. Do you remember when you were buildings your improvements, or making additions to your hotel there, of having a talk with Trodick, in which he told you on a Sunday morning not to build and you told Trodick that you were going to build, and that if Trodick won his case that Auchard would pay for everything?

A. I don't remember—because I started to build; that was the time of the flood and the building of the railroad, and I started to build an addition which was

(Testimony of Charles Forman.)

an office and bedroom over it, and I never had nobody interfere with me at all in the course of building that.

Q. Do you say that such a conversation as I have detailed to you never took place?

A. Not that I know of.

Q. You never told anyone that if Trodick won the case Auchard would pay for everything?

A. Oh, I might have said that—that Auchard would be good for it, or would have to be. I don't know who else to look to after we bought it from Auchard.

Q. You say you might have told that after you bought it from Auchard?

A. Yes; I might have said that.

Q. You might have said it to Mr. Trodick?

A. I can't remember of ever stating it to Mr. Trodick.

Q. You say you might have said it, but you don't know to whom you might have said it? A. No.

Q. But you know that you had that idea?

A. I had this idea, that if anything was wrong, Auchard was good for it.

Q. And if Trodick did tell you not to build, that is probably what you said to him?

A. I can't remember of having Trodick tell me not to build.

Q. But you do remember of saying that if in building there Trodick should win his case, that Auchard would be good to you for whatever you built?

(Testimony of Charles Forman.)

A. Well, after I had dealings with Auchard, I didn't think much about the case, because I just bought the ground, and I thought that would be all there was to it. That is all I knew.

Q. Relied, then, exclusively upon what Auchard told you?

A. Yes, because he was a man of his word and would do what was right.

Q. You don't mean to be understood as testifying that the *Lammlein* land was all south of the railroad track, do you?

A. Well, no, but the best part of it was south.

Q. That is, you mean the best part of it so far as being agricultural land or tillable?

A. Well, if we wanted to plow a patch up on the north side we couldn't have got it.

Q. I am not asking you that; I asked you if you wanted to be understood as testifying that the *Lammlein* place didn't include any land north of the south boundary line of section 35?

A. No, sir, I don't want to be understood that way, because as far as that goes, I don't know, but the biggest part of the ground that was tillable that was worked, was on the south side.

Q. You told us when you were on the stand here before, that the *Lammlein* pasture ran seven or eight hundred feet north of his house.

A. *Lammlein's* ranch? I didn't tell you that. I told you it was all hills and that there was just a little garden patch up there about twice as big as this room—I said eight to nine hundred feet. Now,

(Testimony of Charles Forman.)

it is possible eight hundred feet from the *Lammlein* house to this garden we are speaking of.

Q. North? A. Yes, north—or northwest.

Q. And you don't desire to change your testimony about this? A. I am not changing it.

Q. You don't mean to tell us that the land north of the south boundary line of section 35—

A. You were speaking about the bottom land, and I wasn't speaking about rocks and such—you were speaking to me about tillable land, weren't you?

Q. I am speaking now as to whether you want to be understood as testifying that *Lammlein* didn't have any land north of the south boundary line of section 35.

A. No, sir, I don't want to be so understood, because that *Lammlein* house is north of the south line.

Q. And for seven or eight hundred feet north of the *Lammlein* house—for eight hundred feet north of the *Lammlein* house, *Lammlein* was claiming land?

A. As I stated before, I don't know whether they claimed it above the house and neither do I, and that is what I said the other day. I don't know whether they claimed it or not, only they told me that old *Lammlein* used to have this garden. Now, I never was there when *Lammlein* had the garden there.

Q. You never were there when *Lammlein* was farming any piece of land south of the boundary line of section 35, were you?

A. I was through there—that is all.

Q. Well, did you ever see him farming any lands south of the south boundary of section 35?

(Testimony of Charles Forman.)

A. I can remember of a little flat in there before the railroad came.

Q. Did you ever see *Lammlein* farming any land south of the boundary line of section 35, the south boundary line?

A. I don't know whether he did.

Q. Why is it you are so willing to testify that you saw *Lammeing* farming land south of the south boundary line of section 35?

A. I am not speaking about *Lammlein's* farming. I was speaking about myself and my brother and Mr. Trodick, as I told you before. I don't know anything about *Lammlein* and his farming. That was before I came.

Q. As a matter of fact, you don't know anything about *Lammlein*? A. I knew him.

Q. But you didn't know anything about his farming any land south of the south boundary line of section 35—

A. I knew he had a little flat over there.

Q. But what you are testifying to is what you and Trodick and your brother farmed down there?

A. Yes, sir.

Q. Well, as to your knowledge of his having a little flat over there. Did you ever see him till that flat?

A. No, sir; I seen him working over there and that is all I know, because I seen that from the road—kind of thin places in the brush.

(Testimony of Charles Forman.)

Q. Did you also see him working eight hundred feet north of his house in the garden?

A. No, sir; I never had seen him working around the house.

Q. You say the garden is eight hundred feet north of his house?

A. Yes, about eight hundred feet—a little garden.

Q. Did anybody else put crops in there but *Lammlein*?

A. That I don't know, because, as I said before, I didn't know *Lammlein* good, or know who did it.

Q. How is it that your memory is so clear when it comes to land south of the boundary line. and the minute we get north of the boundary line, that you have no memory or recollection at all? Isn't it because you are interested and trying to show that *Lammlein* had no land north of the south boundary line of section 35, township 15, north of range 4 west?

A. I am just as much interested north of the line as the south side of the line. I know more about the south side because I worked there and broke it for Trodick.

Q. You broke it for yourself and your brother and Trodick? A. Well, in partnership; yes.

Redirect Examination by Mr. WALLACE.

Q. I want to call your attention, Mr. Forman, to the time when you went to live in the old *Lammlein* house, under some arrangements with Trodick; state whether or not that arrangement was that you should have permission, you and your family, to

(Testimony of Charles Forman.)

occupy the house, jointly with the plaintiff Trodick, or whether the arrangement was that you leased the whole of the house and took him to board with you?

Mr. LOEB.—Objected to as leading and not proper redirect examination.

A. Why I leased the whole house from him and boarded Mr. Trodick.

Q. Calling your attention to the size of the patch plowed in section 35, can you tell us what there was left of this patch after the washout—what its size would be? A. After the washout?

Q. The flood.

A. There is the creek that took the biggest part of it, and the railroad took the balance and the county road takes about all of it. That is to the foothills; there is possibly 100 feet in some parts of it from the county road to the foothills.

Q. Before Auchard told you that he was negotiating with the railroad for section 35, had there been any of these buildings put up on the land that you have described in your direct and cross-examination?

A. Yes; there was some of the buildings put up there.

Q. Leaving out of consideration, and taking alone the land without regard to the townsite uses, as it was in March in the year 1904—that is, last March—what would you say the value of the land was?

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent and not proper redirect examination.

A. Taking out the townsite, did you say?

(Testimony of Charles Forman.)

Q. Yes.

A. According to other lands it was worth about \$1.25 or \$1.50 an acre—that is the section.

Q. Now, take the southeast quarter of that section—160 acres—and leave out of consideration the townsite feature; what would you say the land was worth in March, 1904?

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent and not proper redirect examination.

A. And leaving out the 160 acres?

Q. Not to leave out the 160 acres—take the 160 acres and leave out the townsite uses.

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent and not proper redirect examination.

A. The land was not worth anything, as far as that goes, for other than building purposes.

Q. What would you say—how much an acre, for the southeast quarter?

A. I would say the same as the other—the whole section—provided there were no buildings.

Q. Now, then, taking the whole of the southeast quarter, the ground, and assume there was no buildings on it at all, other than the old buildings that *Lammlein* had put there, and that *Trodick* had put there—

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent and not proper redirect examination.

(Testimony of Charles Forman.)

Q. That is, considering now the 160 acres with all the improvements that *Lammlein* had left there, and all that Trodick had put on the ground, and eliminating—that is, leaving out—all the improvements made by anyone else, and considering the worth of these *Lammlein* or Trodick improvements as they were in last March, and the land as it was in last March, what would you say was that land, the *Lammlein* improvements and the Trodick improvements were worth last March?

Mr. LOEB.—Objected to as not being proper redirect examination, and as immaterial, irrelevant and incompetent.

A. The *Lammlein* improvements and the land—that is, counting these 160 acres?

Q. That is it.

A. Well, it was not worth anything for agriculture at all that I can see; the improvements, why they was worth so much for a person to live there.

Q. What value would you put upon them in March of last year, and these 160 acres of land?

Mr. LOEB.—Objected to as not proper redirect examination and incompetent, irrelevant and immaterial.

A. Well, five or six hundred dollars, including this house and the hall there.

Q. Now, calling your attention to this map that has been used in evidence, there appears to be a bridge shown on that map across the Prickly Pear creek.

A. Yes, sir.

(Testimony of Charles Forman.)

Q. Do you know where that bridge actually is across that creek down there to-day—where it crosses the creek?

A. Yes.

Q. You know the bridge?

A. Yes.

Q. Do you know approximately the distance from that bridge to these different buildings you have described as they are on the ground?

Mr. LOEB.—Objected to as not being proper re-direct examination. I thought, Mr. Wallace, you said you were going to have a surveyor cover that. I omitted cross-examining as to a good many of these distances on that account.

Mr. WALLACE.—I am so examining him because you got him to say that while locating them on this plat he was not a surveyor and couldn't tell about the correctness of it, and I am going to show that he can use this bridge on the ground as a means of locating these places.

A. Well, to the store building it is possibly 50 feet.

Q. Wait a minute, Mr. Forman—I didn't ask you how far it was. I asked you if you knew approximately the location of these different buildings with reference to that bridge, as they are on the ground—not what it was. But do you know it?

A. Yes, sir.

Q. Does that bridge, then, as it appears on the map, and as you know it to be on the ground, aid you any as a reference in determining on what lots as appears on the map these buildings that you have enumerated are located?

A. Well, yes.

(Testimony of Charles Forman.)

Q. Did you or didn't you, in making the final improvements that you made upon your property—such of them as you made after this buying from Auchard—place any reliance upon the additional fact that you knew that Trodick himself had also bought of Auchard?

Mr. LOEB.—Objected to as not proper redirect examination, and immaterial, irrelevant and incompetent.

A. Yes, sir; Mr. Trodick told me he had bought from Auchard the same as I had.

Recross-examination by Mr. LOEB.

Q. Mr. Trodick slept in the *Lammlein* house when you were there with your family—yourself and wife—didn't he? A. Yes.

Q. Lived there all the time?

A. Yes, sir; he lived there all the time I had it rented.

Q. So as to the portion wherein Mr. Trodick slept in the house, you could not say that you rented the entire house?

A. Well, I paid him rent for the entire house.

Q. You paid him rent to live there, didn't you?

A. I don't know what else I would do, of course.

Q. He slept there all the time you and your wife were there?

A. Yes, to the best of my memory.

Q. He didn't go out of the house and turn it over to you?

A. No, he turned it over to me, if he went away for a week or anything like that.

(Testimony of Charles Forman.)

Q. But whenever he was in Wolf Creek he slept in the house? A. Yes, sir.

Q. You wouldn't testify that he was away at any time for a week while you and your wife were there?

A. No, sir, because I can't remember.

Q. But he always retained one room in the house for himself?

A. Yes; when I rent a house and a room in it to a person, he is always supposed to have a room there.

Q. You rented the house from him then, didn't you? A. Yes, sir—paid him rent.

Q. And that rent that you paid him was his right to live there and you were to board him and pay him six dollars a month? A. Yes, sir.

Q. Now, I understood you to say in response to a question of Mr. Wallace, that this land south of the railroad track—this *Lammlein* land south of the railroad track—was about one hundred feet in width?

A. South of the railroad track? I never said anything about one hundred feet south of the railroad track.

Q. Didn't you say something about 100 feet from the boundary line to the foothills?

A. Yes; the north side, from the county roadside; some parts of it may be 100 feet to the foothills.

Q. How far was it on the south side to the foothills? A. From the line?

Q. Yes.

(Testimony of Charles Forman.)

A. That I don't know. It must be probably at the north end or east end; might be eight hundred feet in parts of it; and it is narrower.

Q. And in the narrow portion, how wide was it to the foothills?

A. Well, it must be 300 or 400 feet there.

Q. Well, at the point that you and your brother and Trodick farmed there, how far was it to the foothills—from the railroad track to the foothills, where you and your brother and Trodick farmed?

A. Well, it might have been eight hundred feet from the line; six to eight hundred feet.

Q. Now, in response to a question by Mr. Wallace, you figured this land worth about \$1.50 an acre?

A. Yes, taking the whole section.

Q. Can you buy government land within the railroad grant for \$1.50 an acre?

A. Well, you could; I don't know how it is now.

Q. Don't you know that the Government charges \$2.50 an acre for land within the railroad grant?

A. I know there has been land sold for less.

Q. By the Government of the United States?

A. I understood the railroad.

Q. I am speaking about the Government.

A. I don't know.

Q. Don't you know that land within forty miles of the railroad line of the Northern Pacific is put on the market by the Government at double the price of land outside of that line?

A. Yes; that is what I have always heard.

(Testimony of Charles Forman.)

Q. Did you take that into consideration in arriving at the value of this land?

A. I was just arriving at the value by that of other sections.

Q. Did you take into consideration the Government price of this quarter section in arriving at the value of this land?

Mr. WALLACE.—Objected to for the reason that the Government could have no price on this land.

A. No, sir; I didn't think anything about the Government price at all.

Q. Then in your estimate of the value of this land, you based that estimate on the theory that it was railroad land? A. Yes.

Q. And not Government land? A. Yes, sir.

Q. And your entire judgment and answer as to value was based on that theory? A. Yes.

Q. Now, how much is Mr. Trodick's saloon building worth? How much did it cost him to build that?

A. I don't know.

Q. Did you take that into consideration in arriving at the value of this land?

A. All I counted was just the old house and another building.

Q. You didn't take into consideration that Mr. Trodick had, prior to March, 1904, built a public hall on this land and a house on the land and a saloon building—the building that is being used for a saloon?

A. I was only thinking about the two buildings at the time.

(Testimony of Charles Forman.)

Q. So that your answer to Mr. Wallace's question was not based upon a complete idea of what was located there?

Mr. WALLACE.—Objected to as calling for an inference of the witness upon facts.

A. I was just figuring on just the two buildings. I didn't think anything about the saloon at the time.

Q. It must have cost considerable money to build that building, didn't it?

A. I don't know what it did cost.

Q. Then you wouldn't want your answer to stay there in the shape that you put it to Mr. Wallace, as to the value of that land in March, 1904?

Mr. WALLACE.—Objected to as immaterial and not recross-examination.

A. Well, I was looking at it this way—just to take it for agricultural purposes, it wasn't worth anything.

Q. You didn't take into consideration the improvements that Trodick had put on the land up to March, 1904?

A. Now, these two buildings—I said about \$600, probably.

Q. No; before in testifying as to the value of the *Lammlein* place on March, 1904, you didn't take into consideration the fact that the Government sold its land at \$2.50 an acre, within forty miles of the railroad track?

A. No, sir.

Mr. WALLACE.—Objected to as repetition.

Q. Nor take into consideration the fact that Trodick had built a saloon and a store building, used

(Testimony of Charles Forman.)

as a saloon, for that purpose, or a public hall; you didn't take these things into consideration when you testified in response to questions by Mr. Wallace as to the value of the land?

Mr. WALLACE.—Objected to for the reason that it assumes that the saloon building was built as a store building, as to which there is no proof.

Q. When you testified in response to questions as to the value of this land, by Mr. Wallace—the value of the *Lammlein* land on March 15th, 1904, you eliminated entirely from your opinion as to value the fact that the Government charges \$2.50 an acre for land within forty miles of the line of the Northern Pacific Railroad, and also you didn't take into consideration the fact that there was a building built upon the land by Mr. Trodick, which is now used as a saloon building, and also the fact that there was a building built upon the land by Mr. Trodick which was used as a public hall.

Mr. WALLACE.—Objected to for the reason that it assumes that the plaintiff Trodick built the public hall, whereas the proof is that it was built by his son.

A. No.

Q. Now, you didn't take into consideration—eliminating the public hall—you didn't take into consideration the other elements that we have referred to?

A. No, I didn't take the saloon into consideration.

Q. Nor you didn't take into consideration the fact that the railroad was within forty miles and that the Government charges \$2.50 an acre for that land?

(Testimony of Charles Forman.)

A. No, I was figuring on what railroad land and other land was sold for around there.

Q. And you didn't, in answering Mr. Wallace's question, take into consideration the fact that other people have, under permission of Mr. Trodick, put buildings upon this land? A. No.

Q. And you didn't take into consideration, in answer to the question by Mr. Wallace, the fact that this land was valuable as for townsite purposes, and had become so by reason of the Montana Central locating its depot at this point?

A. Yes, that is what I said it was good for—building purposes, and outside of that it wasn't worth much.

Q. And when you speak of its value for building purposes, you spoke of its value prior to March 15th, 1904, did you, and on that date?

A. March 15th, 1904?

Q. Yes. A. Yes.

That is all.

CHARLES FORMAN.

Subscribed and sworn to before me this 18 day of February, 1905.

A. K. BARBOUR,
Special Examiner.

ALBION McDONALD, a witness called on behalf of defendant, sworn, testified as follows:

Direct Examination by Mr. WALLACE.

Q. What is your full name?

A. Albion McDonald.

(Testimony of Albion McDonald.)

Q. Your age? A. 38.

Q. You are a married man? A. Yes, sir.

Q. How long? A. Five years.

Q. A man of family? A. No, sir.

Q. How long have you lived in Montana?

A. Since January, 1883.

Q. Where do you live? A. Wolf Creek.

Q. How long have you lived there?

A. Well, in that neighborhood ever since I came to the country.

Q. When did you go there first to live?

A. I believe it was in 1894.

Q. Had you ever been down there before that?

A. Yes, sir.

Q. When did you first go there to be come acquainted with the place?

A. Well, I was through there in the spring of '83, shooting ducks in that creek there, and in the fall I was through there fishing, and in the meantime I was through there a good many times, running a butcher wagon through.

Q. During what years did you run a butcher wagon there? A. '83.

Q. Now, you have left an interval of '83 to '94—an interval of eleven years that you have not told us about.

A. I was at the old town of Wolf Creek—at Kisselpaugh's or Cartersville from '88 to '91—well, about '90, I think, I left there, and then I was back and forth two or three times a year until '94 when my father died.

(Testimony of Albion McDonald.)

Q. Your father was Angus McDonald?

A. Yes, sir.

Q. Did you live constantly at Cartersville from '88 until 1890 or '91? A. Yes, sir.

Q. How far is Cartersville from the station of Wolf Creek? A. About $\frac{5}{8}$ of a mile.

Q. How frequently during that period from '88 until 1890 did you see this ground now known as the southeast quarter of section 35?

A. Well, perhaps 2 or 3 times a week; we ran a section-house there on the south of the line of 35 for about nine months and I boarded there with my mother.

Q. That was in what time?

A. It was about '89, I think; or '88—I believe it was in '88, the winter of '88-'89.

Q. In that connection did you know the plaintiff, John Trodick?

A. Yes, sir; he boarded with us.

Q. Did you know him when your folks were running the section-house? A. Yes, sir.

Q. What was he doing there?

A. Working on a section.

Q. Boarding where?

A. Boarding with us.

Q. You lived in this section-house 8 or 9 months in '88 and '89? A. Yes, sir.

Q. Do you know where the south line of section 35 afterwards fell? A. Yes, sir.

(Testimony of Albion McDonald.)

Q. Do you know the quarter corner, the southeast corner of section 35, that has been spoken of in evidence here?

A. I have been to the quarter corner several times; the township corner, I know where it is; I have been within 50 or 75 feet of it.

Q. So you think you know practically where it is?

A. Yes.

Q. Do you know the course of the line between these two points?

A. Yes, sir.

Q. What have you to say as to whether the section-house, as it was built in '89 when you lived there, lay to the north or south of where that line now lies on the ground?

A. It lay south.

Q. Can you tell us whether or not the station building and depot lay then north or south of this same line?

A. It lay south.

Q. Can you give us an idea how far south of the line the depot building was?

A. About 165 or 170 feet.

Q. What, if any, change was made in the location of the building after the flood of 1892?

A. I wasn't there at the time they changed it, but I understood they had changed it some 4 or 5 feet either north or south—I believe south, though.

Q. You saw the building afterward, did you?

A. Yes, but it wasn't changed enough so as to be noticeable.

Q. To you it looked unchanged practically?

A. Yes, sir.

(Testimony of Albion McDonald.)

Q. What, if any, change was made in the tracks at the point where the station house was—the depot?

A. Well, the track was changed 5 or 6 feet south and of course the depot was moved to conform to the track.

Q. Do you know the whereabouts of the water-tank at that station? A. Yes, sir.

Q. And what have you to say as to whether that tank is south or north of the line between 35 and 2?

A. It is south.

Q. And the coal-dock and the pump-house?

A. Yes, sir; both of them are south.

Q. Both south of that line? A. Yes, sir.

Q. Going back to the year 1888, do you know where the *Lammlein* house, so called, was?

A. Yes, sir.

Q. Do you know where the county road ran then and now? A. Yes, sir.

Q. What have you to say as to whether there is any substantial difference in the line of that road at points along the ground that we are speaking of?

A. I don't think there has been a change in it more than 5 or 10 feet in any place. In one place it ran over a hill and now they have cut the hill down, and it ran to the right of the hill maybe 20 or 30 feet—that is, to the south.

Q. Do you know of any ground that *Lammlein* had broken in 1888 when you lived at Cartersville?

A. Yes, sir.

Q. Where was it with reference to this south line of section 35? A. Nearly all of it south.

(Testimony of Albion McDonald.)

Q. And where with reference to the railroad tracks as they then were? A. South of them.

Q. And of course south of the depot?

A. Yes.

Q. What extent of land did he have broken over there south of the tracks and depot and section-house?

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent—anything south of the south boundary of section 35.

A. He had perhaps four acres in there.

Q. What was he doing with it?

Mr. LOEB.—Objected to for the same reason, and because this controversy is limited to land north of the south boundary line of section 35; and that any testimony relative to land south of the south boundary of section 35 is immaterial, irrelevant and incompetent. A. Cultivated it.

Q. In what?

A. In general ranch products, grain, potatoes and stuff like that; I have seen grain growing there.

Q. What, if anything, did he have on the north of that line?

A. Well, he had some there, a little garden he had cultivated there; he had cabbage and garden stuff.

Q. About how much of his garden was there?

A. I wouldn't think over half an acre of three-quarters.

Q. What enclosures did he have, either south or north of the line—first, south of the line?

(Testimony of Albion McDonald.)

A. On the south of the line he had brush fences running toward the foothills there and I suppose it did go to the foothills.

Q. Enclosing those four acres of tilled ground?

A. Yes, perhaps 10 or 12 acres enclosed.

Q. On that side? A. Yes, sir.

Q. In the creek or canyon bottom?

A. Yes, sir.

Mr. LOEB.—Move to strike out any testimony relative to anything south of the south boundary line of section 35 as immaterial, irrelevant and incompetent, as the subject of this controversy is land north of the south boundary line of section 35; and that any testimony with reference to anything south of the south boundary of 35 is immaterial, irrelevant and incompetent.

Q. Did this enclosure fence—did or did not this enclosure fence including land south of the south line of 35 at any points extend across the line into section 35?

A. Yes, sir; they crossed the line; this half acre or three-quarters of an acre that I spoke of was adjoining the other broken land there.

Q. That cabbage land was a part of the general enclosure in the bottom? A. Yes, sir.

Q. Now, what other enclosures, if any, did *Lammlein* have north of the line, wholly or in part?

A. Well, he had a little garden at the house, perhaps a quarter or an eighth of an acre there.

Q. Enclosed? A. Yes, sir.

(Testimony of Albion McDonald.)

Q. Well, what other enclosures did he have?

A. He had a corral and a stable, a slab stable there; and I think that was about all the enclosures I remember of.

Q. How close was the stable and corral to his house? A. Nearly opposite.

Q. That is opposite toward the creek?

A. Yes, south, it would be about southeast.

Q. About how far away from the house?

A. I should think about 125 feet.

Q. What enclosure was there immediately at the house?

A. Well, there seemed to be perhaps three-quarters of an acre, or some such matter, with a picket fence around it; half an acre perhaps; that would include the yard, with this garden that I spoke of.

Q. Was the house in the bottom or up on the mountainside?

A. In the bottom; there was some part of the house apparently built into the side of the hill—but it into the bank there; but the main house is right in the bottom.

Q. In other words, backed up against the mountainside? A. Yes, sir.

Q. How far was it from this 12 or 14 acre enclosure that included land in the bottom both north and south of the section line?

A. To his house?

Q. Yes, the nearest point of that enclosure.

A. Oh, about, I should think—about 500 feet.

(Testimony of Albion McDonald.)

Q. What was the largest enclosure he had there in '88?

A. Well, that I spoke of—that 10 or 12 acres.

Q. Which enclosed the bottom land that he tilled?

A. Yes, sir.

Q. Did the big flood accomplish any change in the creek channel?

A. Yes, sir.

Q. What was the nature of that change?

A. Well, the creek used to go against the south bank at Wolf Creek there and south of the depot, and it changed it to the north side of the depot.

Q. It now runs about how far to the north of the depot at a point opposite it?

A. About one hundred and twenty or ten or fifteen feet.

Q. About how far to the south of the depot did it run at the same point, opposite the same point, before the flood?

A. Well, I think it was about 40 or 45 feet.

Q. Was the creek south or north of the railroad tracks before the flood?

A. South, that is, for a part of the way. It crossed the section line about a quarter of a mile above the depot—just at the commencement of the depot yards.

Q. What, if any, change was there in the condition of things, as you have described them in 1888 until the year—well, I will say until *Lammlein's* death?

A. Well, after the railroad was built through there in '87, he didn't seem to till any of the ground

(Testimony of Albion McDonald.)

north of the railroad as it was built; he confined himself more particularly to south of the railroad.

Q. After the railroad has gained its right of way through there, do you know whereabouts *Lammlein* and the railroad respectively claimed with reference to the county road?

A. Yes, sir, I know exactly.

Mr. LOEB.—Objected to as immaterial.

Q. You may state what if any monuments there were evidencing it.

A. As I understood it, the deed that Mr. *Lammlein* gave to the Montana Central Railway embraced a strip about 1500 feet long, or such a matter, and it intersected the county road about where my buildings are, opposite the county bridge at Wolf Creek at the present time, and there was a tree marked there up on the hillside there, and I always understood that was one of the corners.

Mr. LOEB.—Move to strike out the testimony of the witness as to what he understood, as being incompetent; and for the further reason that the deed that *Lammlein* gave to the Montana Central Railway Company is the best evidence as to what *Lammlein* sold to the Montana Central Railway Company.

Q. What, if anything, was the common understanding—the general understanding as to this mark on that tree?

A. That it was a corner.

Mr. LOEB.—Objected to for the same reason as given to the last question.

(Testimony of Albion McDonald.)

Q. And where with reference to the county road at points opposite Forman's place, down to the eastward, did the railroad land go?

Mr. LOEB.—Objected to for the reason that the deed that *Lammlein* gave to the Montana Central Railway Company is the best evidence of the land which the Montana Central purchased of *Lammlein*.

A. About 450 feet, I would think.

Q. Along that road?

A. Well, yes; it would be almost along the road; the corner tree stood off to the left of the road perhaps forty feet—on a bank.

Q. I want to know where, with reference to the county road, the north line of the railroad land was.

Mr. LOEB.—Objected to for the reason that the deed of *Lammlein* to the Montana Central Railroad Company, which is in evidence in this case, is the best evidence of what land was conveyed by *Lammlein* to the Montana Central Railroad Company.

A. About 20 or 30 feet to the north of it.

Q. To the north of the entire road, or to the north of the south line?

A. To the north of the north line of the road—that would be about where the wheel tracks were, as the road was defined there.

Q. Do you know a man named George Houghton?

A. Yes, sir.

Q. When did you first become acquainted with him down there? A. I think about 1888.

Q. What was he doing when you first knew him?

(Testimony of Albion McDonald.)

A. He was agent there for the Montana Central Railway Company.

Q. Living where?

A. Living in the depot.

Q. Where did he live as long as you knew him?

A. Always lived there.

Q. In the depot? A. Yes, sir.

Q. Did you know *Lammlein* personally?

A. Yes, sir.

Q. And you know Trodick, the plaintiff in this action? A. Yes, sir.

Q. Do you know Forman? A. Yes, sir.

Q. Were you there when Forman came to live on that ground? A. Was I there?

Q. Yes.

A. Yes, sir—or just up at Cartersville. It was called Wolf Creek there at that time and the station also was called Wolf Creek— $\frac{5}{8}$ of a mile further down.

Q. The town of Wolf Creek was then at what is now Cartersville? A. Yes, sir.

Q. Do you know where Forman went to live when he first came there? A. Yes, sir.

Q. Where?

A. He went to live in the old *Lammlein* house, the first I know.

Q. Was Forman a single man, or a man of family? A. He was a married man.

Q. His family lived in that house?

A. Yes, sir.

(Testimony of Albion McDonald.)

Q. Did Trodick ever have anything to say to you with reference to where he claimed land, with reference to where he claimed land, with reference to the railroad right of way?

A. Well, only that I understood he had bought all the old *Lammlein* claim there, which was on both sides, on the south side as well as the north.

Q. Have you heard the testimony of Mr. Forman?

A. I have heard some of it; some of it I didn't hear.

Q. Could you tell us what buildings were put up on this property that is now the Auchard Wolf Creek townsite?

A. Yes, sir.

Q. After you knew it, outside of the *Lammlein* house?

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent.

A. Yes.

Q. I wish you would do so.

Mr. LOEB.—I would like to have it understood that all testimony of the witness given here is objected to on the same ground—that it is immaterial, irrelevant and incompetent.

Q. What were these buildings? Try and keep them in order of time of construction.

A. The first building was put up by Mr. Forman for a butcher-shop, if I remember right, about 1890.

Q. Who occupied it?

A. Charles Forman and his wife.

(Testimony of Albion McDonald.)

Q. And how long did they continued to occupy it?

A. Ever since.

Q. For what purpose?

A. For his own purposes—for a butcher-shop for a while and since then for running a hotel there.

Q. The original building of 1890 was then a part of the present hotel?

A. Yes, sir. The next building, do you wish?

Q. Yes, if you please.

A. Was a log building built by my father some time in 1890 or 1891.

Q. What for? A. He built it for a store.

Q. When completed, what was it used for?

A. Used for a store.

Q. For how long?

A. Off and on for the last ten years.

Q. And it was built when?

A. That was built in '91, I think.

Q. And what use was made of it before the last ten years? A. Before the last ten years?

Q. Yes, from 1891 to 1895?

A. Well, my mother and I lived there some of the time and my wife and I lived there some of the time; and we rented it for two or three months.

Q. Did you know anything about any claim in these years of the Montana Central Railway to the ground south of the county road?

A. Yes, sir.

Q. What do you know about that, Mr. McDonald?

A. Well, it was always accepted by the people there that they had bought the piece of ground from

(Testimony of Albion McDonald.)

Lammlein for depot purposes and right of way, and I believe it was recognized for 2 or 3 years afterwards until they realized that the Montana Central could not buy any unsurveyed land outside of a right of way of 100 or 200 feet.

Q. Well, now, as to the next building after your father's store building?

A. Well, I don't know whether Mr. Trodick put up a saloon there the next building, or George Lloyd put up the blacksmith-shop.

Q. Well, described each, if you don't know which was first in point of time.

A. The Trodick building was a frame building about 16x28 or 30, or 18x28 or 30.

Q. Single or double story?

A. One story. A cheaply constructed building.

Q. Probable cost was what?

A. Well, I wouldn't think over \$350.00 or \$300.00.

Q. And its value in March, 1904, if you know?

A. Well, it isn't worth so much now as when it was built, as it has got old and shattered and it has been moved around some.

Q. Can you value it in March, 1904?

A. About the same valuation—\$350.00 or \$300.:00.

Q. Was this building the one spoken of as built by Trodick for a saloon? A. Yes, sir.

Mr. LOEB.—Objected to for the further reason that the witness has not qualified himself to testify as to values.

(Testimony of Albion McDonald.)

Q. Have you put up frame buildings at that point, Mr. McDonald? A. Yes.

Q. State whether or not you are familiar with the material and labor cost for such structures at that point. A. I am.

Q. Have you had buildings erected for yourself there?

A. Yes; I have had three buildings, two frame and one brick building—not all at that point; there is one on my ranch.

Q. Now, this building that your father put up was what kind of a building? A. Log building.

Q. Worth about how much when completed?

A. Oh, perhaps \$150.00 or \$175.00.

Q. And now the blacksmith-shop?

A. Worth perhaps \$60 or 75.00—perhaps \$50.00 would cover the cost of it. It was a very cheap affair—not shingled.

A. And when were the blacksmith-shop and the Trodick saloon built—about when?

A. The Trodick saloon was built in 1892; and now I am not sure whether the blacksmith-shop was built in '92 or not; but I am under the impression that it was in '92 or '93.

Q. What use was made of the Trodick saloon building, after it was finished?

A. It was used for saloon purposes.

Q. By whom?

A. Mr. Trodick and Mr. Pritchard.

Q. They were in business together?

A. Yes, sir.

(Testimony of Albion McDonald.)

Q. And they carried on business in that building for how long?

A. Well, it has been used for a saloon building ever since. I don't know how long the firm of Trodick & Pritchard lasted—something less than 6 months or less, but Mr. Trodick and his sons have run it as a saloon since, and it has been rented for the last eighteen months to Mr. Bray as a saloon.

Q. Where did Mr. Trodick himself room after finishing the saloon building?

A. In '94, when I came *yp* there Mr. Trodick was living in the saloon building.

Q. The saloon business carried on there at the same time? A. Yes, sir.

Q. Do you know anything about the occupancy of the old *Lammlein* place by Mrs. Bissell?

A. Yes, sir.

Q. During about what period did she occupy it?

A. Well, I was there, I think, that spring—it was '92 or somewhere along there. I think perhaps 3 or 4 or 5 months, something like that. I don't just remember so particularly about that.

Q. Might have been a year or more, for all you remember? A. Yes, sir; it might have been.

Q. Can you give us any idea of the total value of the improvements put on the ground by Forman where he built? A. At the present time?

Q. Yes.

A. They are worth about \$6,000.00.

Q. Cents or dollars?

A. Six thousand dollars.

(Testimony of Albion McDonald.)

Q. After the Trodick saloon and the blacksmith-shop were completed, what next building was put up?

A. I think my father put up the next building.

Q. In what year? A. In '92.

Q. What kind?

A. It was a building 26x30, with a stone basement, and two stories above the stone basement.

Q. Costing about what to construct it, if you know?

A. Nothing, only what I heard him say when I came home—that it cost him between fifteen and sixteen hundred dollars.

Q. Regardless of what he told you, judge its value from what you know.

A. I was one of the appraisers in 1894 when my father died, and we appraised it at \$1200.00.

Q. Independent of what the appraisers did, can you give us an idea of what it is worth?

A. Now?

Q. Yes, now.

A. I suppose it would be worth about \$1200.00.

Q. After this building was completed, what use was made of it and by whom?

A. My father used it for a store and lived in the basement part of it.

Q. Until he died? A. Yes, sir.

Q. And what use has been made of it since your father's death?

A. We ran a store there and rented it for store purposes since, and lived there a little.

(Testimony of Albion McDonald.)

Q. Constantly used?

A. It was idle occasionally.

Q. What building was put up next after your father's store building?

A. I built an implement shed in '95 or '96.

Q. Of what nature? A. Frame building.

Q. Size? A. It was 25x50 feet.

Q. Costing how much when completed?

A. Cost about \$225.00.

Q. Used for what purposes there then and until now?

A. Used for an implement shed for about a year and then afterwards I finished it inside and used it for a store, and it is now being used for a dwelling.

Q. And the next building was put up there when and by whom? Do you remember anything about a building put up by a man by the name of Shively?

A. There was a small log building put up sometime in '93 or '94 by Shively.

The EXAMINER.—We will now take a recess until two o'clock.

(Hearing resumed.)

(At this time, J. W. Wade was examined, in order to let him get away, it being the understanding that the examination of McDonald should, when transcribed, follow in regular order.)

Q. When that building was completed, what use was made of it and by whom?

A. Shively lived in it.

Q. For about how long?

(Testimony of Albion McDonald.)

A. Well, I would think a couple of years; I am not sure.

Q. What became of it finally?

A. It was torn down and a fellow by the name of John Erickson bought it and worked it into a chicken-coop, and tore some of it down and used the material for a chicken-coop.

Q. Now, what other buildings do you recall being built there?

A. I think the next building to be built there was Charley Forman's addition to the hotel or Billy Reinig's store; they were both started about the same time—I don't remember which was finished first.

Q. That was when? A. In 1900.

Q. And Reinig's store was what kind of a building?

A. It was a frame building 25x55 or 60.

Q. One or two stories? A. One story.

Q. Costing about what to construct it?

A. I think about seven or eight hundred dollars.

Q. And used for what when completed?

A. For a store building.

Q. And has been put to what use since?

A. Always been a store since.

Mr. LOEB.—It is understood, is it, that the same objection goes to all this line of testimony?

Mr. WALLACE.—Yes.

Q. And the addition to the hotel?

A. Been used as a hotel building ever since.

(Testimony of Albion McDonald.)

Q. Made of what material? A. Frame.

Q. Costing about what to build it?

A. About two thousand dollars or over.

Q. And used for what since its completion?

A. For a hotel.

Q. What other buildings do you recall being put on the ground?

A. I built a brick building there; started in 1902 and finished in 1903.

Q. Size of the building was what?

A. 25x62.

Q. Costing how much when completed?

A. About eighteen hundred to two thousand dollars.

Q. Before you began that building, what, if any, knowledge did you have as to the plaintiff, John Trodick, having contracted to purchase or purchased ground, in what is *know* as the Auchard Townsite, from David Auchard?

Mr. LOEB.—Objected to for the reason that it is immaterial; and for the further reason that the proof shows that Trodick, simply for the purpose of living in peace upon the land during the time that this litigation should be finally determined, bought his peace of Auchard by paying him a certain sum of money, and that it was with reference to a compromise between himself and Auchard as to the particular lot on which Trodick was located, and therefore any evidence with reference thereto is inadmissible.

A. I had heard both Auchard and Trodick say—I had heard Auchard say that he had sold to Tro-

(Testimony of Albion McDonald.)

dick and that Trodick selected his land; and Charley Trodick and John Trodick both told me he had.

Q. Told you what?

A. That he had selected his land and agreed to buy from Auchard and had made him a payment on it.

Mr. LOEB.—Move to strike out the testimony of the witness for the same reason as indicated in the objection to the question just before it.

Q. How long was this before you put up the brick building?

A. About two and a half or three years—two and a half, I think.

Q. What, if any, reliance did you place upon this statement of John Trodick's as to having admitted Auchard's title, before you built?

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent.

A. Well, it satisfied me that he had quit fighting and had recognized Auchard's title, and that it was safe to build—perfectly safe.

Q. You said that Al Trodick, I think, told you he had selected ground?

A. Yes; Al Trodick told me once.

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent.

Q. Who is Al Trodick?

A. Son of John Trodick.

Q. Did he ever live with his father down there?

(Testimony of Albion McDonald.)

A. I don't know whether he lived with him; he lived in the same neighborhood—yes, he did live with him for a time; the winter he first came.

Q. Is he the one who entered land on section 2?

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent.

A. Yes.

Q. Well, what did Al Trodick do with the land in the Auchard townsite that he selected and bought?

Mr. LOEB.—Objected to on the ground that it is immaterial, irrelevant and incompetent; and that there has been no legal or competent proof introduced that Al Trodick purchased any land from Auchard, and that the deed showing the purchase is the best evidence of that, and that the testimony of the witness is hearsay, and incompetent, irrelevant and immaterial.

A. He said that he had a fine piece of land there for a hall.

Q. For a hall?

A. For a public hall; and he afterwards built a public hall on it.

Mr. LOEB.—Move to strike out the answer for the further reason that what Al Trodick said is in no way binding upon the complainant in this case.

Q. When was this hall built?

A. I think in 1901.

Q. About what was its size?

A. About 25 by 55 or 60.

Q. And the materials of which it was constructed?

A. It was constructed of lumber.

(Testimony of Albion McDonald.)

Q. And used for what after it was completed?

A. For a hall.

Q. Private or public uses? A. Public.

Q. Were any additions ever made to the Reinig store? A. Yes, sir.

Q. When? A. I think it will be about 1902.

Q. And the nature?

A. He built a piece on to the back end of it; it was the same width and height; it was 35 feet longer, making the building 85 feet, and then they built an L too that they used for a warehouse, about 26x35 or 40.

Q. And the cost of this addition was approximately what?

A. Well, somewhere in the neighborhood of seven or eight hundred dollars.

Mr. LOEB.—It is understood, of course, that all of this testimony with reference to buildings being built and parallel testimony with reference to their cost, etc., by Mr. McDonald is objected to as was that by Mr. Forman, as being incompetent, irrelevant and immaterial.

Q. And used for what purpose after completion?

A. Store and mercantile business.

Mr. LOEB.—It is understood between counsel that all the testimony of Mr. McDonald and Mr. Forman with reference to the other buildings upon this tract and as to their cost—in fact, their entire testimony is objected to as immaterial, irrelevant and incompetent.

(Testimony of Albion McDonald.)

Mr. WALLACE.—Does that make it satisfactory now?

Mr. LOEB.—Yes, if it is satisfactory to you.

Q. Now, have you detailed all the buildings that were put up, Mr. McDonald?

A. Well, I believe, that Trodick made some slight addition to his house—the *Lammlein* house, somewhere about 1900 or 1901, building a slight piece on to it.

Q. Did Bissonette, the *blacksmith*, put up any building?

A. Yes, he built a building there three years ago.

Q. What was its nature?

A. A frame dwelling.

Q. Costing about what when completed?

A. The contract called for \$600.00.

Q. Should you judge that that was its fair cost or was that high or low?

A. I thought it was very reasonable.

Q. And what use was the building put to after it was completed?

A. Mr. Bissonette and his family lived there.

Q. Now, during the time that each and all of these buildings were put up that you have described in your testimony, state whether or not the plaintiff, John Trodick, was about where he could see the construction, or was absent and away?

A. He was right on the ground all the time. That is he may have been away a week or two at a time, but the buildings required a month or more to construct them, either or any of them.

(Testimony of Albion McDonald.)

Q. What, if any, protest did he ever make against your constructing the buildings you caused to be constructed on that ground? A. Never made any.

Q. Did he ever in any manner warn you not to build on the ground? A. No.

Q. Who is living on the bottom land, the land in the bed of the canyon, that lies to the south of the south line of section 35 at the present time?

A. Mr. Antone Rhein and the storekeeper there, John Burns, and his family now occupy the house that Al Trodick built over there on that side.

Q. When was that house built, if you know?

A. Of Al Trodick's?

Q. Yes, about when? A. About '97.

Q. Whereabouts is it with reference to a south line drawn from the depot—would it be east or west of the depot?

A. Of a line drawn east and west?

Q. No, a line drawn north and south.

A. It is almost directly opposite the depot.

Q. Such a line would *almost* cut the house in two?

A. Yes, I believe it would.

Q. How many houses are there over there?

A. Just the two houses.

Q. How far apart are they?

A. About nine hundred feet.

Q. That is, from each other? A. Yes, sir.

Q. Whereabouts is either of them with reference to this ten or twelve acres that *Lammlein* had under fence at the time that you first spoke of that ground in 1888?

(Testimony of Albion McDonald.)

A. One is at the upper end of it, where *Lammlein* started to take out the ditch once, and the other is about nine hundred feet, as I said, east of that, and where that house is now, I don't think it was cleared at that time.

Q. This ditch that you spoke of that *Lammlein* started to take out—when did he start to take it out?

A. I don't remember; somewhere before '92.

Q. During his lifetime, of course?

A. Yes, sir. It is the ditch that Mr. Worth referred to as putting in a water-wheel.

Q. It is the ditch that Worth referred to, is it?

A. Yes, sir. There is no sign of the ditch there now. They put a water-wheel in and perhaps started 15 or 20 feet of the ditch, just the head of the ditch, and the high waters afterwards washed the wheel out and washed the head of the ditch out.

Q. What, if anything, do you know concerning the adjustment of fences on the lot lines of the Auchard townsite survey or the street lines of that survey by the plaintiff, John Trodick? State fully.

A. Well, after he bought land from Auchard, he put his fence lines on the street lines—

Mr. LOEB.—Just a minute. We object to the statement of the witness as to the purchase of land from Auchard, for the reason that the best evidence of any purchase of any land from Auchard would be the deed conveying the land, and that the testimony is incompetent, irrelevant and immaterial—oral testimony of the purchase of any lands.

(Testimony of Albion McDonald.)

A. (Cont'd.) —both at his saloon and in front of his residence, and he afterwards moved his saloon out to the street line.

Q. That is, moved the saloon building?

A. Yes, sir.

Q. Did you ever have any talk with him about doing this—why he was doing it?

A. No, I don't know that I ever had any particular talk with him.

Q. Were you there when he did it?

A. Yes, sir.

Q. Do you know where the survey line, the street line of Auchard avenue fell on the ground according to the townsite survey?

A. Yes, I think he and I were together there at one of the corners—the corner of lot 9. Also where the angles come into the street there—about 150 feet west of lot 9.

Q. When you say that you and he were together, do you mean that you stood together or that your ground cornered, or touched?

A. He and I stood together there and were discussing the corner—I believe he showed it to me once, and it was an iron pin that was stuck up in the way there, and I believe he set it down so it was flush with the ground.

Q. Did you at any time take Trodick to any land attorney here in town, if so, when?

A. In 1896.

Q. Who was it?

A. Mr. Frank L. Reece.

(Testimony of Albion McDonald.)

Q. And for what purpose did you take him to Reece and upon what understanding?

Mr. LOEB.—We object to this for the reason that the witness Reece would be the best evidence as to the purpose for which Trodick came to him.

A. For the purpose of filing a contest with the Northern Pacific Railway Company, with the understanding that I was to pay the attorney's fees of \$100.00 and I was to get the land that I was claiming there; it was a stone quarry at that time.

Q. With whom was this understanding had?

A. Mr. John Trodick.

Q. The plaintiff? A. Yes, sir.

Q. And did you make any payment for John Trodick, in pursuance of that understanding?

A. I gave Mr. Reece \$15.00.

Mr. LOEB.—Objected to on the ground that it is immaterial, irrelevant and incompetent.

Q. For whom? A. Mr. Trodick.

Q. In cash? A. Yes, sir.

Q. Was that ever repaid you by John Trodick?

A. No, sir.

Q. Or ever tendered back to you?

A. No, sir.

Q. Did John Trodick know of this payment?

A. He was present at the time. I asked him if I should pay it and he said yes.

Q. Can you describe upon this plat—exhibit 1—the ground which you were to have as the ground then claimed by you? A. Yes, I think so.

Q. I wish you would do that, please.

(Testimony of Albion McDonald.)

A. It was nearly all embraced in 9 and ran down 600 feet. I had filed a quarry claim that cut right across the corner there and ran to this railroad track.

Q. I will cover the quarry claim in a moment. It was nearly all in lot 9?

A. Lots 1, 2 and 3 in block 3 and lot 9 in block 1 in the Auchard townsite.

Q. How much of lot 9 was excluded from your claim on the front and back end?

A. Why, I think it came perhaps within a foot or a foot and a half; it was very close there—maybe two feet.

Q. Of the southwest corner?

A. It would be the west corner more than anything else. The southwest corner.

Q. Southwest corner of the lot?

A. Yes, sir.

Q. Did that cover a parallel strip along the line?

A. It cut across here again.

Q. You will have to indicate in some way.

A. Cut across like that and up on the hill 1500 feet.

Q. How many square feet on the whole surface would be excluded from your claim—of this lot 9?

A. Might be ten feet square.

Q. In the southwest corner?

A. Ten square feet—in the southwest corner.

Q. In a triangle shape?

A. Yes. And it would be pretty hard to tell where it intersected that line out here.

(Testimony of Albion McDonald.)

Q. You indicate a point about a third of the way down the side line of 9 as the point of intersection?

A. Not that far.

Q. One-quarter of the way?

A. About three feet on the front side and perhaps ten or twelve feet on the south line.

Q. Between nine and eight? A. Yes, sir.

Q. Now, you spoke of a quarry claim. When did you assert that quarry claim?

Mr. LOEB.—We object to the introduction of any evidence relative to the quarry claim for the additional reason—in addition to the general objection, that all this testimony is irrelevant, incompetent and immaterial—that the records of the United States Land Office are the best evidence of any quarry claim that the defendant McDonald may have.

A. I think in 1888 or 1889. Mr. *Lammlein* was yet alive.

Q. Did Trodick know of it?

A. Yes, sir; everybody down there knew of it.

Q. Was that quarry claim the subject of discussion between you when this arrangement was made to give you the ground you claimed?

A. Yes, sir.

Mr. LOEB.—We object to all testimony with reference to the quarry claim and move to strike it out—all testimony that the witness gave with reference to going to Reece and the understanding between them and Trodick, for the reason that it now appears from the testimony of the witness that it was an endeavor

(Testimony of Albion McDonald.)

to compromise their difficulties at Wolf Creek in addition to the general objections of irrelevancy, incompetency and immateriality.

Q. Did you ever have any talk with Trodick about buying from Auchard, before he bought, and what he was going to do?

Mr. LOEB.—Objected to for the reason given in the general objection, and the additional reason that the time and place is not given.

A. Before he bought from Auchard?

Q. Yes.

A. I can't recall that I had any particular talk.

Q. Did he say anything at any time as to the advisability of buying rather than fighting?

Mr. LOEB.—Objected to for the general reason given in all objections to the testimony of this witness, and for the further reason that it appears that the statement was made with reference to a compromise that was made between Auchard and Trodick, and it is therefore inadmissible.

A. Yes, sir.

Q. Please state what he said, giving his own language.

A. He said he would rather pay a small price for the ground along the street line there than to have to clear the 160 acres there, as he didn't regard that land as worth paying taxes on—the hill land.

Q. Are you familiar with this southeast quarter of section 35, spoken of in evidence here?

A. Yes, sir.

(Testimony of Albion McDonald.)

Q. Are you familiar with any other sales of land in the same section and in the adjoining sections?

A. Yes, sir.

Q. How did the land sold in that section and the adjoining sections compare in quality and kind with this land?

A. It is exactly the same character of land.

Q. Do you think you know what was the market value of this southeast quarter of section 35, in February and March, 1904?

A. Yes, sir.

Q. Excluding all improvements put on any part of it by persons other than Trodick or *Lammlein*, what have you to say as to the market value of the ground in 1904?

Mr. LOEB.—Objected to as being *incompetent*, irrelevant and immaterial.

A. It was worth about \$1.25 or \$1.50 an acre.

Q. And what were the improvements that had been placed there by either *Lammlein* or Trodick himself, the plaintiff, worth in March, 1904?

Mr. LOEB.—Some objection.

A. You mean to include the town hall?

Q. No, I don't mean the Al Trodick improvements. I mean those put there by the plaintiff himself.

A. About \$650.00.

Q. Do you know George Houghton?

A. I do.

Q. Did he ever offer these improvements to you after *Lammlein's* death?

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent; and further, that there is no

(Testimony of Albion McDonald.)

testimony in this case that shows that Houghton ever owned the land or improvements.

A. Yes, sir.

Q. How long was this after *Lammlein's* death?

A. Why, during a period of about 90 days.

Q. Did Houghton then claim to be acting in a representative capacity or for himself in making these offers to you? A. For himself.

Mr. LOEB.—Move to strike out all testimony of the witness with reference to offers of Houghton to sell him the land or improvements, for the reason that such an offer should be in writing; and that testimony showing the representative character of Houghton should be in writing, and that no sale of land is competent except the evidence thereof be in writing.

Q. You said you had bought some of this ground from Auchard yourself. What did you pay for it?

A. A townsite?

Q. Yes.

A. One dollar and seventy-five cents a front foot.

Q. Cash? A. Yes, sir.

Q. Where was this ground with reference to the ground on which you built your brick building?

A. It is the same ground.

Q. The building stands on this ground that you bought of Auchard? A. Yes, sir.

Q. What statement of Trodick's did you rely on when you paid Auchard \$1.75 a front foot for that ground?

(Testimony of Albion McDonald.)

Mr. LOEB.—Objected to for the reason that it is immaterial, irrelevant and incompetent.

A. Well, the fact that both Mr. Forman and Mr. Trodick had bought their land; and that was a year or so before I managed to buy mine. Mr. Auchard got mad at me for trying to help Mr. Trodick to get the land away from him, and he wouldn't sell to me for what he sold to the others; he sold to Trodick and Forman for \$1.00 and charged me \$1.75 a front foot. And I had to get another party to buy it for me.

Q. Did Trodick at this time move his saloon out to the street line? A. Not at that time; no.

Q. Or change his fences?

A. I don't just remember.

Q. How many times did Houghton interview you in the 90 days following *Lammlein's* death for the purpose of accomplishing a sale of the *Lammlein* improvements?

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent.

A. Well, perhaps a dozen times; nine to a dozen times.

Q. When you first knew John Trodick, what was he doing? A. Working on a section.

Q. A section laborer? A. Yes, sir.

Q. On what railroad?

A. Montana Central at Wolf Creek.

Q. When you came back to live at Wolf Creek after your father's death, where did you find Trodick living?

(Testimony of Albion McDonald.)

A. I found he was living in the saloon there—the back part of the saloon.

Q. What appliances did he have for farming at that time or thereafter?

A. I never saw him have any, and I would have known it if he had.

Q. You mean, then, that he had none?

A. Yes, sir.

Q. What livestock, if any, did he have?

A. I don't remember of him having any.

Cross-examination by Mr. LOEB.

Q. Don't you know that Mr. Trodick had about 25 head of cattle?

A. No, sir; I know that he didn't have—Mr. John Trodick, you mean?

Q. I mean on this place.

A. You mean Mr. John Trodick?

Q. Yes. A. I know that he didn't have.

Q. Don't you know that the Trodicks down there did have that many head of cattle—John Trodick and his sons?

A. I don't think they ever had 25 head; they may have had 10 or 12 head, but that I understood belonged to Al Trodick.

Q. All you know about it is what you understood about it?

A. Well, I know about it for I was right there.

Q. Who is representing you in this action? Is Mr. Wallace acting as your attorney?

A. Mr. Wallace and Mr. Bullard.

(Testimony of Albion McDonald.)

Q. You appear here, then, by Mr. Wallace and Mr. Bullard in this litigation?

A. Well, I am also named as one of the defendants.

Q. But Mr. Wallace and Mr. Bullard are looking after your interests here as well as the interests of the Auchard estate and those of the Northern Pacific Railroad?

A. Yes.

Q. Are you paying Mr. Wallace a fee?

A. No, sir, I am not.

Q. Have you guaranteed Mr. Wallace a fee?

A. No, sir, I have not.

Q. Have you guaranteed to pay Mr. Bullard a fee?

A. No, sir, I have not. There has never been anything said about a fee.

Q. In the event you would lose your land down there would the estate have to reimburse you?

A. I don't know.

Q. Would you look to them?

A. Yes, I would try to get the money from them.

Q. Did you have any understanding with Auchard about being reimbursed in the event his title failed?

A. No, sir, I thought it was absolute.

Q. Then you relied on the Auchard title?

A. Certainly.

Q. You took a quitclaim deed and absolutely released the Auchard estate from any liability in the event their title fails?

(Testimony of Albion McDonald.)

Mr. BULLARD.—Objected to as improper cross-examination.

A. You say that I took a quitclaim deed?

Q. Yes.

A. No, sir, I took a warranty deed.

Q. And you wouldn't want to say now that you would release the Auchard estate from any of the covenants in that warranty deed?

A. Well, I would be foolish if I did.

Q. I am not asking you whether you would be foolish or not. I want to know as a matter of fact now which position you are going to take, whether you are going to release the Auchard estate from their covenants to make good the title to you in the event that their title fails, or whether you are looking to the Auchard estate to protect you in the quiet enjoyment of the title you brought from them.

Mr. BULLARD.—Objected to as immaterial, irrelevant and incompetent.

A. I don't quite understand the difference in the question. It seems similar to me.

Q. You said you had no interest in this litigation.

A. I said I have not?

Q. Have you?

A. I didn't say that. Yes, sir, I have; certainly.

Q. What is the interest that you have in this litigation?

A. Well, all the buildings that I have at Wolf Creek are on this land that is in dispute.

(Testimony of Albion McDonald.)

Q. And you are interested in the litigation only because you have buildings on what was formerly the *Lammlein* ranch?

A. Well, my business is established too; an established business.

Q. What business are you in, Mr. McDonald?

A. The saloon business.

Q. And your saloon is north of the south boundary line of section 35?

A. Yes, sir.

Q. And your saloon is on the *Lammlein* ranch as it was formerly known?

A. Yes, sir.

Q. And you have a warranty from David Auchard for this saloon building?

A. For the ground that the saloon building is on.

Q. And you have covenants of warranty from him that guarantee you in the quiet enjoyment of this land?

A. That is my understanding of a warranty deed; yes.

Q. So that you don't feel now like releasing the Auchard estate from any liability to you under these covenants?

Mr. BULLARD.—Same objection as heretofore presented.

A. Why, certainly I don't feel like releasing them.

Q. Why is it that you don't now release the Auchard estate from any liability to you by reason of the covenants contained in this warranty deed?

Mr. BULLARD.—Same objection.

A. Why is it?

(Testimony of Albion McDonald.)

Q. Yes, sir.

A. Because I want to be guaranteed against loss.

Q. And you are guaranteed against loss. And why is it now that you don't release that guaranty.

Mr. BULLARD.—Same objection.

A. You say I am guaranteed against loss?

Q. You said you were—I don't know.

A. Well, I was just asking if that was the question.

(Question read to witness again.)

A. I don't know any reason why I should. I don't see the object of getting a guaranty and then releasing it.

Q. Isn't it because of the fact that John Trodick has a claim on this land?

A. Not particularly; no.

Q. Were it not for the claim of Trodick you would be willing to release it, wouldn't you?

A. No, sir, I would not. Never.

Q. Why wouldn't you?

A. Well, because I have always understood it was the proper thing in real estate transfers to get a warranty deed, so as to stop any other claims.

Q. You had an abstract of title made, did you, when you bought this land on which your saloon building is situated, from Auchard?

A. No, I don't know that I did. I did have attorneys, McConnell & McConnell, and relied on those attorneys.

Q. They were the attorneys for Auchard, weren't they?

(Testimony of Albion McDonald.)

A. No, sir, not that I know of; never knew that they were.

Q. Did you investigate the files of the land office, or have your attorneys do so before you bought this land?

A. No, sir. I suppose that they did it, though; I relied on them.

Q. You knew *Lammlein* in his lifetime, didn't you? A. Yes, sir.

Q. You knew Mrs. *Lammlein*, after *Lammlein's* death? A. Yes, sir.

Q. Did Mrs. *Lammlein* reside on the place after *Lammlein's* death? A. Yes, sir.

Q. Was it then that Houghton offered to sell you the improvements?

A. No, my remembrance is that it was after Mrs. *Lammlein* went away.

Q. Was it after Trodick moved on the land?

A. No, sir; Trodick wasn't on the land.

Q. As a matter of fact, didn't your father locate a placer claim over this identical land about the time of *Lammlein's* death?

A. No, sir; that is the quarry claim that has been referred to.

Q. Then you located a quarry claim about the time of *Lammlein's* death?

A. Before *Lammlein's* death—in 1888.

Q. It was during the time that *Lammlein* was living there? A. Yes, sir. He was there.

Q. What were you going to use this placer claim for?

(Testimony of Albion McDonald.)

A. We thought at one time that there was a sandstone ledge there, and it was going to be a handy place to ship rock from.

Q. Did you ever enter it in the land office?

A. No, sir; we filed it as a quartz location with the county clerk.

Q. Did you ever do anything with it other than the quartz location?

A. We didn't hold it as a quartz location; we held it as a quarry claim.

Q. You left it with the county clerk?

A. No, sir; we filed it with the county clerk.

Mr. LOEB.—We now make demand upon the counsel for the defendants, and upon this witness as one of the defendants to produce a certified copy of the location of the quarry claim or quartz location, for evidence in this case.

Mr. BULLARD.—We will endeavor to supply it.

Q. You say Mr. Trodick worked in the section-house at Wolf Creek?

A. He worked on the section, not in the section-house.

Q. And you knew him before he moved down to the *Lammlein* house?

A. Well, he wouldn't move down; he would move up and across.

Q. Did you ever know of Trodick living anywhere from the time that he moved across to the *Lammlein* house, until the present time, except on the tract of land that *Lammlein* was claiming as a farm?

A. No, sir.

(Testimony of Albion McDonald.)

Q. And when did Trodick first move into the *Lammlein* house?

A. It seems to me it was in the fall of '91, but I would not be sure about it.

Q. So since the fall of 1891, John Trodick has been a resident of this tract of land, north of the south boundary line of section 35, which we have called in this case the *Lammlein* ranch?

A. Yes, sir.

Q. When did you first know *Lammlein*?

A. In '83.

Q. You didn't know him before '83, did you?

A. No, sir.

Q. But from the time that you first knew *Lammlein*, from 1883, until the time of his death, he lived on this *Lammlein* ranch?

A. Yes, sir.

Q. You testified as to seeing *Lammlein* work some land south of the railroad track.

A. I don't think I testified to that. I don't think I ever saw him work on land south of the railroad track, because at that time there was brush between the main road and where he would be working, so it would be almost impossible unless you went on the ground to see him working there.

Q. Did you know the bottom that was included in the *Lammlein* ranch in 1883?

A. I did, very well.

Q. Did the railroad track practically intersect it in halves?

A. Well, it was more than halves. It left anywhere from two-thirds to three-fourths of it on the

(Testimony of Albion McDonald.)

south side of the railroad track—well, no, I wish to amend that; about three-fifths on the south side of the railroad.

Q. And about two-fifths on the north side?

A. Well, perhaps not quite two-fifths, but about that.

Q. Well, *Lammlein*, when you knew him, was occupying all of the land that is at present north of the south boundary line of section 35, up to the bluffs on the north, wasn't he? A. Yes, sir.

Q. And practically from Wolf Creek on the west to a point on the east where the creek was rip-rapped—if you locate that point?

A. No, he didn't claim only about 125 yards above his house—west of his house. Kisselpaugh claimed in there.

Q. But there was no one east of Kisselpaugh but *Lammlein*?

A. Not directly east and adjoining them.

Q. How far east did *Lammlein* claim?

A. Well, I always understood that he had taken up half a mile square there, taken up both sides of the creek; taken up the whole bottom; that is what I always understood.

Q. You knew this *Lammlein* claim, didn't you?

A. Yes, very well.

Q. You knew that Trodick had purchased the *Lammlein* claim? A. Yes, sir.

Q. At one time I understood you were on the side of Trodick in this fight against Auchard?

(Testimony of Albion McDonald.)

A. Yes, sir.

Q. That is, before you built your house on this land, was it?

A. No, sir; we had buildings on it at that time.

Q. Now, on what theory were you taking sides with Trodick as against Auchard?

A. Because previous to the time that Trodick bought the land—previous to 1896—

Q. No, I am asking you—

A. I will have to explain the question.

Q. I am asking you on what theory you took that position.

A. I am going to explain the theory.

Q. This was previous to 1896.

A. I am going to state—it was previous to 1896—

The EXAMINER.—Let him answer the question in his own language, Mr. Loeb.

A. I had understood that land that was railroad land you couldn't enter it as a homestead, and as early as '87 and '88; in '86 along there, it was the general talk of many of the people down there that that *Lammlein* claim—that is, a part of it would fall in a railroad section.

Q. That is as early as '87?

A. '87 or '86. The southwest corner of section 36 corners just about a quarter of a mile, or a little over a quarter of a mile from *Lammlein's* house; and it was easy to determine from there, by looking over the ground, that that line would perhaps cut through that bottom, and perhaps half would be in railroad land; and when I came and saw Mr. Reece, with Mr. Trodick, he said that if he had settled on the land in 1882

(Testimony of Albion McDonald.)

it exempted it from the operation of the N. P. grant, —that is why I tried to help Mr. Trodick at that time. I had buildings on that land and I was anxious to get title to it.

Q. That was in '87 or '88?

A. Yes; along in 1886—from 1883.

Q. In 1883, then, you knew that the Wolf Creek townsite was on an odd-numbered section?

A. That it was very liable to fall on an odd-numbered section. It was general talk.

Q. And you also knew that *Lammlein* had located on that section?

A. He had located on it before that time.

Q. But your knowledge of this being an odd-numbered section was as early as 1886 or 1887?

A. Yes, sir.

Q. What did Auchard tell you when Auchard undertook to sell you lots on this land?

A. Well, after the contest was over in the Helena land office, here, in 1896, and Trodick had lost the case in the local office, Auchard came to me and told me that he had an agreement with the N. P. to buy this section, with certain others, and that Trodick could not possibly win the ground, for some reason it had been decided against him, and convinced me that I ought to buy of him, but I still stayed with Trodick though he tried to convince me.

Q. But you didn't buy it of him then?

A. No; he offered it to me in the first place at \$1.25 a front foot.

Q. When did you first buy, then?

(Testimony of Albion McDonald.)

A. I could tell by looking in the deeds. I think it was 1899.

Q. Did Auchard know of the claim of Trodick?

A. Why he certainly did.

Q. When did he first know of the claim of Trodick?

Mr. BULLARD.—Objected to unless it is shown that the witness has personal knowledge.

A. Well I suppose he knew it when the contest was filed in '96.

Q. All you ever did with this quartz location or quarry location was to file a record of the same in the county clerk and recorder's office?

A. And did the representing work on it for five years—five hundred dollars.

Q. You never undertook to have it patented, did you?

A. We never got that far.

Q. Have you stopped doing representation work on it now?

A. Yes, sir.

Q. Why did you cease representing it?

A. It was in '96, when Trodick and I had the understanding about it—that he would let me have the land if I paid the attorneys' fees.

Q. That is in the event he succeeded in getting title to his homestead there?

A. Yes, sir.

Q. Was that contract in writing?

A. No, sir; just a verbal agreement.

Q. Can you give us the date when you were in Reece's office and paid him the \$15.00?

A. Not the exact date; no, sir.

Q. The year?

(Testimony of Albion McDonald.)

A. I think it was in the spring of '96—the spring of '96.

Q. Where did Houghton live?

A. Well, he lived in the Montana Central depot at Wolf Creek.

Q. Did he ever live in the *Lammlein* house?

A. I think not; in fact, I am sure he didn't; I never knew him to live anywhere except in the depot.

Q. Did he ever do any farming?

A. Houghton?

Q. Yes. A. No, sir.

Q. He was their agent and telegraph operator there at Wolf Creek?

A. Agent and operator, yes, sir.

Q. How long was he there?

A. I don't just remember; it seems to me about three years—some such matter.

Q. Came there shortly after the railroad went through, or did he come there with the railroad?

A. Not with it; there were several agents before he came, and operators.

Q. He never undertook to do any farming, did he?

A. Never knew him to.

Q. Never entered any land that you know of?

A. Not in that vicinity.

Q. His residence in Wolf Creek was simply as agent of the Great Northern Railroad Company and telegraph operator at their station, at the present town of Wolf Creek? A. Yes, sir.

Q. Was a salaried man, of course, for the railroad? A. Well, I suppose so.

(Testimony of Albion McDonald.)

Q. You wouldn't undertake to say that it was not John Trodick's money that built that public hall, would you?

A. No, I couldn't tell whose money it was.

Q. Then you don't know really, Mr. McDonald, as to who built that public hall, whether it was John Trodick or someone else—that is, as to whose money went into it?

A. I knew that Al Trodick and Charley Trodick were in the saloon business there, and I heard them say they were going to put up a hotel; and Al Trodick worked on it; and I understood it was revenue from the saloon business that they were using to build the hall.

Q. And it is your understanding entirely that you base your testimony on as to the value of the improvements that Trodick put on the ground?

A. I don't quite understand.

Q. I say that it was your understanding that you testified as to where this money came from—and not any actual knowledge—that built that hall?

A. Of course, I don't know where the money came from or who gave him the money to build the hall. I supposed it came from the saloon business; he told me it did, anyway.

Q. Now, there never was any survey of Wolf Creek made other than the survey that Dave Auchard made, that we have portrayed on that townsite map?

A. I never knew of any.

(Testimony of Albion McDonald.)

Q. It was shortly after that survey was made, marking the lots and blocks there, that this matter took place about moving fences? A. Yes, sir.

Q. And conforming to the line?

A. Yes, sir.

Q. Everybody in the community conformed to the line, didn't they?

A. Well, some did, and some didn't. I didn't make any change in my place except when I built the brick building to build on the line.

Q. As soon as that survey was made there, that particular survey for town purposes, everyone living there undertook to conform to that survey?

A. Yes, sir.

Q. They do now? A. Yes, sir—you bet.

Q. If anyone is building there they try to conform to that survey? A. Yes, sir.

Q. As far as lots and blocks are concerned? Didn't build in the middle of the street, in other words? A. No, sir.

Q. Did you take into consideration when you gave your estimate as to the market value of the Trodick homestead the fact that it was within forty miles of the railroad, and that the price of Government land within forty-mile limit is \$2.50 per acre; and did you also take into consideration the fact that it was close to the town of Wolf Creek and the station of Wolf Creek and that it was valuable for town purposes?

A. I wasn't asked that question.

Q. I asked without any improvements there would the commercial value there, the commercial value on

(Testimony of Albion McDonald.)

March 15th, 1904, of the *Lammlein* and Trodick homestead be enhanced considerably by reason of the fact that a town had sprung up in that vicinity?

A. Yes, sir.

Q. And it had also enhanced in value by reason of the permanent location of the Montana Central railroad and its depot close to this *Lammlein* or Trodick homestead?

A. Yes, sir; it seemed to increase in value on that account.

Q. So that the *Lammlein* land would really be worth more than the adjacent farming land of the same character?

A. More from a business standpoint, you mean?

Q. Yes; from a commercial standpoint.

A. Yes, sir.

Q. And you don't want to be understood as testifying, do you, Mr. McDonald, that the *Lammlein* ranch wasn't worth over \$1,000, March 15th, 1904, taking into consideration its location?

A. Well, I didn't testify that way. I testified that outside of the improvements there and what other land was worth in the vicinity there. That was what I based my price on.

Q. Now, taking into consideration the proximity of this land to the station at Wolf Creek, what would you say it would be forth?

Mr. BULLARD.—Objected to as not proper cross-examination, and incompetent, irrelevant and immaterial.

(Testimony of Albion McDonald.)

A. You mean, take the entire ground as it stands to-day?

Q. The *Lammlein* or Trodick ranch, as you understand that ranch. What would that be worth, taking into consideration the fact that the Montana Central Railroad had established its depot at Wolf Creek, and its location at that point?

Mr. BULLARD.—Same objection.

A. If you wanted to use it for ranch purposes it would depreciate in value; if you wanted to use it for commercial purposes it has increased.

Q. If used for commercial purposes you would value it now at how much?

A. About one thousand dollars.

Q. That is, it would be increased in value about that much—about one thousand dollars?

A. Yes, but I don't figure it would be worth very much in the first place.

Q. It was worth in the first place the Government price, wasn't it?

A. I don't think so—because I had purchased land adjoining it for \$2.00.

Q. You bought that from the railway—or bought it from the Masons very recently? It was from the Auchard estate, wasn't it, and came to the Masons through the Auchard estate? A. Yes.

Q. So it originally came from the railroad?

A. Yes.

Q. When did you pay \$2.00 an acre for the land adjoining this? A. About 2 or 3 weeks ago.

(Testimony of Albion McDonald.)

Q. Now, the old *Lammlein* house is worth something, isn't it? A. Yes, sir.

Q. How much would you say that would be worth?

A. The *Lammlein* house is an old house and built of logs, in the first place, and outside of the improvements that Mr. Trodick put there I wouldn't consider it worth very much; it might be worth from \$250.00 to \$300.00, I should think.

Q. And some money was expended for planting trees on this ranch, wasn't there?

A. I don't know how many trees there was—perhaps eight or ten or twelve.

Q. There were some fruit trees put in there, wasn't there?

A. I think so; it seems to me there was about five.

Q. Mr. Trodick and his sons erected a town hall on this land, didn't they? A. Yes, sir.

Q. What did this town hall cost, do you suppose?

A. About \$225.00, I should think.

Q. Are you not giving these values pretty low, Mr. McDonald?

A. The reason I am putting the hall low is that it is not finished inside. It is nothing but rough studing inside.

Q. It brings rent, does it?

A. It has been rented, but it is not rented at the present time. And I think \$225.00 would cover it from what I have expended for other buildings.

Q. What rent does Bray pay Trodick for the saloon? A. I don't know.

(Testimony of Albion McDonald.)

Q. What rent do you pay for your saloon building?
A. I *own* my saloon building.

Q. What do you consider your saloon building worth?
A. In rent?

Q. No, in value?

A. I estimated it cost between \$1,800 and \$2,000; it is a brick building.

Q. Mr. Trodick put up a saloon building there, didn't he?
A. Yes, sir.

Q. How much do you suppose that was worth?

A. I believe I stated in direct examination that it was worth from \$300 to \$350. The building was considerably shattered and not finished; it has cotton paper.

Q. Taking \$350 for the Trodick saloon and \$300 for the town hall—that is, \$650—and \$350 for the Trodick house, is that about your estimate?

A. About that, yes, sir.

Q. Now, what *you would* estimate the fruit trees, and fences and corrals at—another hundred dollars?

A. He hasn't got any corrals there.

Q. Well, the stone cellars that are there—are they worth anything?

A. Well, I don't know much about the condition of those stone cellars.

Q. There are two stone cellars there, aren't there?

A. I have been in there but I don't just remember what they consist of.

Q. They are worth a couple of hundred dollars?

A. I should not hardy think so.

(Testimony of Albion McDonald.)

Q. Worth one hundred dollars?

A. I wouldn't hardly think so, but I don't know the state they are in.

Q. Wouldn't you say that all the buildings we have talked about, and the fences, and the land for townsite purposes—that this land was worth about \$3,000.00?

Mr. BULLARD.—Objected to as incompetent, immaterial and irrelevant.

A. No, sir.

Q. There was a period of time that Mrs. Bissell lived in the old *Lammlein* house on this *Lammlein* place?

A. Yes, sir.

Q. During that time Trodick lived in the saloon building, didn't he?

A. That is my understanding of it; yes, sir.

Q. This saloon building is also on the *Lammlein* ranch?

A. Yes, sir.

That is all.

ALBION McDONALD,

Subscribed and sworn to before me this 24th day of January, 1905.

A. K. BARBOUR,
Special Examiner.

Wednesday, ten A. M. January 18th, 1905.

Parties present by counsel. On motion of Mr. Bullard and by agreement the hearing was adjourned over until ten o'clock A. M. Thursday, January 19th.

A. K. BARBOUR,
Special Examiner.

Thursday, January 19th, 1905.

ALBION McDONALD, recalled, testified:

Direct Examination by Mr. WALLACE.

Q. Mr. McDonald, I neglected to ask you as to the farming features of the Trodick occupancy, what farming implements, if any, did the plaintiff, John Trodick, have when he was down there?

Mr. LOEB.—Objected to as repetition.

A. Why, I never saw him with anything in the way of a plow, or a harrow, or a hayrake, or mowing machine, that a man would naturally need in farming.

Q. What farming products did he ever sell that were grown on that place?

A. I never knew of any except perhaps a few potatoes—a few little vegetables. I never knew him to sell any *ahy* or raise any hay or anything of that kind.

Q. Did he have any mower, or hay-stackers, or appliances for putting away hay? A. No, sir.

Cross-examination by Mr. LOEB.

Q. This was a small farm of *Lammlein's*, wasn't it? A. Yes.

Q. It wouldn't be treated as a large ranch, would it?

A. No, sir, but it would be necessary to have farming implements to farm it.

Q. Do you mean to say that there never was any hay raised on the land between the point on the west where Wolf Creek empties into the Little Prickly Pear and a point on the east—say 100 yards east of the stone quarry?

(Testimony of Albion McDonald.)

A. Well, the stone quarry—you don't mean the stone quarry that is up above Wolf Creek—you mean the one we had reference to west?

Q. Below your place?

A. The one I had filed on?

Q. Well, we will tie it down differently. Do you know the point east of Wolf Creek—the now town of Wolf Creek, the depot—the place where the railroad turns around a sharp point?

A. East of Wolf Creek?

Q. Yes. A. Yes.

Q. Well, that is about two hundred yards east of the depot?

A. Yes, sir—even more than that; over a quarter of a mile.

Q. We will begin at that point and go east up the Prickly Pear Creek to where Wolf Creek empties into Lilee Prickly Pear Creek; do you mean to say that there was no hay ever raised in that bottom?

A. There never was any hay raised in that bottom. I wish to qualify that in this way in saying that if grain that was raised there was used for hay. There never was any natural hay there.

Q. There was grain raised there?

A. Yes, I believe in '91 or '92—perhaps two or three or four acres; that was in section two; that wasn't in section thirty-five.

Q. Who raised the grain there in 1892?

A. Well, I understood that Mr. Trodick and Mr. Forman did.

(Testimony of Albion McDonald.)

Q. Well, the portion that you know as section two is the portion south of the railroad track and between the railroad track and the bluffs?

A. No sir; section two is south of the township line of section thirty-five.

Q. But most of it is the land that is now south of the railroad tracks, and is being tilled now?

A. Why, the land before the washout that was bottom in there, in front of the depot, and the bluff that is north of the depot, to the place where the creek is running there now, was a piece of open ground. And after the depot was built there, *Lammlein* saw his finish down there—in '88 or '89—and it was never used afterwards between the depot and the county road for agricultural purposes.

Q. Now, before the day of the railroad, there wasn't any difference between the land south of the railroad and the land north of the railroad, so far as being bottom land was concerned—it was all about the same class of land, wasn't it?

A. Well, yes, sir.

Q. The entire bottom was the same?

A. Yes, sir.

Q. It was all used together—that is, the portion in 35 and the portion in 2?

A. Yes, sir.

Q. And you say the portion in two where the grain was raised was about four acres?

A. Well, perhaps not as much as that—two and a half to three and a half acres. I can't tell; perhaps there might have been four.

(Testimony of Albion McDonald.)

Q. And with the exception of these two and a half or three and a half acres in section 2, the *Lammlein* place was all north of that 2 and west of it?

A. Why, as I explained a moment ago, there was quite a bit of clear land north of the depot—an acre or an acre and a half of this clear land, and this clear land would run between that and this piece of ground on section two.

Q. But whatever ranch *Lammlein* had there, eliminating the two and a half acres in section 2 you told us about, would all lie north of section two and west of section two?

A. Whatever ranch that *Lammlein* had?

Q. Yes.

A. The balance of his claim would *like*?

Q. Yes. A. Yes, sir.

Q. The balance of the *Lammlein* claim, eliminating the two and a half acres that you say is south of the section line there?

A. Yes; that was in grain.

Q. Eliminating that it would all lie to the north and to the west? A. Yes, sir.

Q. I mean to the north of section 2 and to the west of these two and a half acres.

A. Well, it couldn't be to the west of them.

Q. But it would be northwest of them?

A. Yes, *si.r*.

Q. Now, you saw the place, didn't you, Mr. McDonald, prior to the railroad going through it?

A. Yes, sir.

(Testimony of Albion McDonald.)

Q. And prior to the railroad going through it, the land that is now occupied by the railroad tracks west of the bridge in this bottom—

A. West of the bridge?

Q. Yes, west of the bridge across Wolf Creek, the land occupied now by the railroad tracks was part of the grain land, wasn't it?

A. West of the bridge?

Q. Yes; and north of the section line.

A. Why, there wasn't any clear ground in there, and there is not yet, if you noticed.

Q. Now, Mr. Bickell told us that he put a section line right through the center of the grain field—half to one side and half to the other; don't you think he would know more about it than you would?

A. I don't know whether he would know more about it in stating the exact location, because I have been there since '83 and ought to know something about it. The greater part of it lay to the east of the bridge—not to the west of the bridge.

Q. The two and a half acres in section two would lay to the east of the bridge?

A. No; this here place that *Lammlein* used to have broke up is east of the bridge, and in front of the railroad depot and took in what is the railroad depot now, and from that to the Benton road.

Q. *Lammlein* also claimed all of the ground back north of his house some seven or eight hundred feet, didn't he?

A. Yes, sir.

(Testimony of Albion McDonald.)

Q. Now, who claimed the land from a point north and south opposite the garden, from bluff to bluff—north and south?

A. Who claimed the land which way from that?

Q. Q. Well, in a point, straight across, north and south?

A. In a point north and south? Which way from that—west from that line?

Q. Say east of the line north and south, that would cut the garden; who claimed the land from there down to this point two hundred feet east of the railroad depot, or three hundred feet east of the railroad depot?

A. Why *Lammlein* claimed even further down than two hundred feet east of the depot—or south of the depot.

Q. In fact, was there anybody, when you first knew the ground, was there anybody laying any claim to that bottom? A. None whatever.

Q. Other than *Lammlein*? A. No, sir.

Q. And do you know of any one else who ever made claim to that? A. No, sir.

Mr. BULLARD.—Are you confining that question to the condition before the railroad was built?

Mr. LOEB.—Prior to the time that Trodick purchased.

A. I understood while *Lammlein* was claiming it, no one else claimed it.

Q. There was no one else claiming it while *Lammlein* claimed it; that is the way you understood it?

(Testimony of Albion McDonald.)

A. Yes; that is the way I understood your question.

Q. Well, you had located a placer claim on part of this land, hadn't you, and tried to buy it of Houghton?

A. Tride to buy the land of Houghton?

Q. Yes.

A. I never tried to buy land of Houghton.

Q. Did you locate a placer claim on part of it?

A. In '88 or '89. Mr. *Lammlein* knew about it at that time, and didn't make any objection to it; he said he didn't claim that ground.

Q. Where was that ground?

A. I indicated it on the map. It ran from the corner of the section-house in about a due north course 1500 feet, and a westerly direction from the section-house 600 feet, and then 1500 feet north, so as to take in a regular placer claim.

Q. You never got any patent? A. No, sir.

Q. And never did anything with it towards securing a patent on it?

A. Only to do the representation work on it.

Q. You have ceased to do representation work on it? A. Yes, sir.

Q. You haven't any placer claim there now?

A. No, sir; no placer claim—sort of a quarry claim.

Q. What have you done with the quarry claim?

A. Nothing, in the past few years.

Q. Done any representation work on it?

A. No, sir.

(Testimony of Albion McDonald.)

Q. When did you last do any work on it?

A. When Mr. Trodick and I made that agreement in 1895 or 1896; somewhere along in there.

Q. There was no writing to any such agreement that you are claiming now?

A. No, sir; none whatever. Only a verbal agreement and the fact that I paid Reece \$15.00.

Q. Mr. LOEB.—Move to strike out all testimony with reference to the agreement with reference to lands, between the defendant McDonald and the plaintiff Trodick, on the ground that no agreement with reference to lands is valid unless in writing, and that all testimony referring to any oral agreement for the sale or transfer of lands is incompetent.

Mr. WALLACE.—Defendants resist the motion.

Q. Now, what was raised on the garden which is about seven hundred or eight hundred feet south of the section line—*Lammlein's* garden—or north of the section line.

A. You have reference to that little garden patch up on the hillside?

Q. Yes.

A. Why, I didn't pay much attention to it; a small garden crop. I don't just remember. I suppose there was some beets in there and carrots.

Q. What else?

A. Why, I couldn't swear positively to anything in there.

Q. Did you ever see any tobacco?

A. No, sir.

Q. Did you ever see any celery?

(Testimony of Albion McDonald.)

A. No, sir.

Q. Any cabbage?

A. Well, I wouldn't swear there was no cabbage or no tobacco. I just simply saw it riding by, and wouldn't take any close note of it.

Q. That was on section 35, wasn't it?

A. Yes, sir.

Q. And his entire garden on section 35?

A. *Lammlein's* entire garden?

Q. Yes.

A. Well, as I understood, there was just a small piece in there.

Q. Not what you understand, but what you saw.

A. No; that wasn't his entire garden, because the greater part of his garden was on the right-hand side of the road—was between the depot and the Benton road; he had a large garden in there.

Q. Did he also have a garden in front of his house? A. I believe he had a little garden.

Q. What did he have planted in there?

A. I couldn't swear that he had anything planted in there. Just a little garden—radishes and *lettuc*.

Q. Don't you know what he had in there?

A. No.

Q. Didn't make any further examination as to what he had in there? A. No, sir.

Q. Do you know if he had any fruit trees around his house? A. *Lammlein*?

Q. Yes.

(Testimony of Albion McDonald.)

A. Why, I am pretty positive he didn't. I never heard of any fruit trees being in there until the last few years.

Q. Where are the fruit trees?

A. They are opposite the old *Lammlein* house now.

Q. Who put them there?

A. I believe Mr. Trodick did. Either he did or had it done.

Q. You don't want to be understood as saying that there wasn't any grain raised on the land north of the section line, the south boundary line of section 35, do you? A. Never has been any since 1888.

Q. Well, prior to 1888 would you want to be so understood? A. Yes, sir; there were some.

Q. There was some?

A. Well, the grain *ptch* might have extended into it—I think it did, perhaps.

Q. As a matter of fact, wasn't the entire bottom in grain that was open in 1888?

A. No, sir; as I just told you, there was a part of it in garden.

Q. Eliminating, then, the portion that he had in garden, wasn't all the open bottom land in grain?

A. Well, I believe it was—yes, I believe it was.

Q. And isn't it true that the railroad went right through this grain field?

A. Yes, I believe that is true, too.

Q. How many feet is it from the railroad to the *Lammlein* house?

A. From the railroad bed to the *Lammlein* house?

(Testimony of Albion McDonald.)

Q. Yes; from the railroad track to *Lammlein's* house.

A. Do you follow the county road from the bridge, or in a straight line?

Q. Say a straight line.

A. Oh, about nine hundred feet.

Q. And the hills don't begin until you strike *Lammlein's* house, do they?

A. It depends upon which direction you are coming from.

Q. Coming from the railroad track?

A. If you are coming from the railroad track you strike the hills.

Q. Back of *Lammlein's* house, going straight up that way.

A. The hills are right north from the depot there.

Q. There aren't any hills between the railroad track and the *Lammlein* house, are there?

A. No, sir. It is right down in the bottom, almost clear across the bottom.

Q. *Lammlein's* house is in the bottom?

A. Yes, sir.

Q. And there is 900 feet of bottom land south of *Lammlein's* house and north of the railroad track?

A. A strip nine hundred feet long.

Q. In width?

A. I didn't say in width—you asked me in a straight line.

Q. Yes, in a straight line.

A. Yes, it is 900 feet.

(Testimony of Albion McDonald.)

Q. So the width of the bottom from *Lammlein's* house to the railroad track would be nine hundred feet?

A. Certainly not. It is right down in the bottom. You are at the depot.

Q. I don't think you understand me.

A. Perhaps not.

Q. I understood you to say that it was nine hundred feet north of the railroad track—from the railroad track to *Lammlein's* house?

A. I asked you from the Montana Central depot.

Q. Well, let's take it from the Montana Central depot. You say it is 900 feet from the Montana Central depot in a straight line to the *Lammlein* house?

A. Yes; that is up and down the creek.

Q. Well, how far is it from the railroad track north and south to the *Lammlein* house?

A. About 235 or 40 or 50 feet, perhaps—that is, from the railroad track.

Q. Yes. About two hundred and fifty feet. Now, the land included within the area of 250 feet north and south from the railroad track to *Lammlein's* house and the nine hundred feet from *Lammlein's* house to the depot, is bottom land, or was all bottom land in 1888.

A. Well, the nine hundred feet is clear across that bottom; yes, sir.

Q. And it was all bottom land?

A. Yes, that would be a triangle in there. Yes, sir; that would be bottom land in there.

(Testimony of Albion McDonald.)

Q. What was raised in that bottom?

A. Nothing.

Q. Was there no grain raised?

A. Well, there might have been just on the upper edge of the depot and around the depot, but the greater part of that was all brush.

Q. Was any grain raised west of the depot?

A. Well, I doubt very much if it came west of the depot; might have been a few feet west of the depot. I wouldn't say positively just how far it went, but only a very short distance.

Q. All of that land at one time was brush in there and had to be cleared?

A. Yes, sir.

Q. It has been mostly cleared now, hasn't it?

A. I think not.

Q. A good portion of it has been cleared.

A. Well, quite a bit of it has been cleared; yes.

Q. What use was made of the land north of the garden, that *Lammlein* had? Did he use it for pasture?

A. Which garden have you reference to?

Q. The garden upon the hill.

A. Why, I think it was used for pasture—but it wasn't enclosed; it was just up on the sidehill and anybody could use it—anybody's stock.

Q. You will swear, will you, that there was never any attempt made to enclose that?

A. Well, I have driven cattle through there.

Q. Will you say that you know no attempt was made to enclose that?

(Testimony of Albion McDonald.)

A. With the exception of a fence on the lower side to keep the stock from going down into the road, there was never any attempt made, I ever saw, to enclose it on the north end.

Q. No attempt except what, did you say?

A. There was a piece of fence across the foot of the gulch.

Q. The foot of the gulch is how many feet from the *Lammlein* house?

A. I should think two hundred and fifty feet, or two hundred feet.

Q. And there is a sort of a natural fence there—isn't there the bluffs back of his house—do they form a sort of natural fence?

A. Oh, no.

Q. Did you say some attempt was made to keep the stock out?

A. I said there was a fence put across the lower end of the gulch to keep stock from crossing the road; I never saw any particular benefit of the fence.

Q. But you saw the fence there?

A. Yes, sir.

Q. And as to whether there was any other fence or not, you simply say you never saw one—you don't want to be understood as saying there was no other?

A. I have been over the ground and passed through it without difficulty; I don't see why I would say it. I don't see how a fence would be there of any benefit to any one if a person could have ridden a horse through it.

Q. You simply say you didn't see it?

(Testimony of Albion McDonald.)

A. Yes, and I will swear there was no fence there. I couldn't have ridden a horse through it without having seen it.

Q. Of course you are not interested in any way in this litigation?

A. I am simply interested in telling the truth about it. I don't want to tell you anything but what is the truth in regard to it.

Q. From your experience as a farmer, Mr. McDonald, would you expect a man having a ranch such as Trodick or *Lammlein* had down there, to have any very fancy stackers?

A. No; I don't think that a stacker would be necessary.

Q. And according to the amount of ground that *Lammlein* and Trodick had in there, you wouldn't consider it necessary to buy any of the very modern patent stackers, would you?

A. No, sir.

Q. In fact, there was no occasion to have any hat stackers, was there, because they had grain, as you say?

A. No, I wouldn't think there would be any occasion for them.

Q. You would think a man could get along with a grain ranch, and potatoe ranch that you say belonged to Trodick in that bottom without any stackers?

A. Yes, sir.

Q. You wouldn't need any threshing machine there, would you?

A. No, sir.

Q. In fact, he could get along with the small ranch that *Lammlein* and Trodick had there with a very small amount of farming machinery?

(Testimony of Albion McDonald.)

A. Well, it would be necessary to have some.

Q. Didn't you sell Mr. Trodick some horses and a wagon one time at an auction?

A. Yes, sir—not to John Trodick; to Mr. Charley Trodick.

Q. That was his son? A. Yes, sir.

Q. You don't know for whom Charley was buying, do you?

A. He claimed he was buying them for himself, and he used them afterwards to freight with.

Q. You don't know that they never were used in connection with carrying some of the products from this land to different points?

A. Why, I am positive they never were.

Q. You are sure that these horses never were used in any way in connection with any products that were raised on this place?

A. Well, there may have been a load of potatoes hauled with them, but I doubt it. I don't think they were.

Q. Did you ever examine the sheds of Mr. Trodick very carefully to see if he had any farming utensils there? A. I have been through them.

Q. Did you go there for that purpose?

A. No, sir.

Q. Will you swear positively that he never owned any?

A. No, I wouldn't swear positively that he never owned any; but I would have seen them if he ever used them.

(Testimony of Albion McDonald.)

Q. Well, we will have some witnesses to show that you don't know. A. Well, that will be all right.

Q. The county road used to run, didn't it, right where Auchard Avenue is now?

A. Very nearly; yes.

Q. *Lammlein's* house faced the county road?

A. Yes, sir.

Q. And faces Auchard Avenue?

A. Yes, sir.

Q. The fence line on the west of Auchard Avenue was to the west of the county road?

A. I don't understand the question.

Q. The fence line to the north of Auchard Avenue—the north boundary of Auchard Avenue was to the north of the county road?

A. Yes, sir; it must have been, if it was north of it—If I understand your question. The fence line to the north of Auchard Avenue was to the north of the county road.

Q. Yes, sir.

A. Yes, sir. I don't think the county road has been moved down there over ten or fifteen feet, if it has been moved that much—that is, right at the *Lammlein* house.

Q. So there was nothing unusual, then, in *Lammlein* adjusting the front of his house to the line of Avenue. A. *Lammlein* didn't do that.

Q. Trodick? A. Mr. Trodick did; yes, sir.

Q. I say, there was nothing unusual in his doing that?

(Testimony of Albion McDonald.)

A. Well, there was no necessity for adjustment. He wanted to get out to the very edge of the line; he was within a few feet of it, any way.

Q. Within a few feet north of it, or did he lap over toward the south of it.

A. I kind of think he lacked a few feet of coming out to the line.

Q. His house was to the north of the north side of Auchard Avenue, or the north boundary line of Auchard Avenue, a few feet?

A. His house was a few feet?

Q. No; I mean his fence.

A. His fence was a few feet to the north of the line; yes.

Q. And all he did when he adjusted his fence to the survey that Mr. Auchard made of the Auchard townsite, was to move his fence south a few feet, so as to be on the line with other fences?

Mr. WALLACE.—Objected to as not cross-examination.

A. Yes; he moved his fence out to conform to the street line, as laid by the Auchard survey.

Q. That is, he simply took in a greater area in that yard?

Mr. WALLACE.—Same objection.

A. He enclosed more *groud* by perhaps a foot or a foot and a half, or two feet, or five feet; something like that.

(Testimony of Albion McDonald.)

Redirect Examination by Mr. WALLACE.

Q. Mr. Loeb spoke of your placer claim and you kept speaking of your quarry claim; are they different claims or did you have but the one claim?

A. One claim.

Q. You spoke of the boundaries of the claim. How were they actually marked on the *groud*, if at all?

Mr. LOEB.—Complainants object to this question for the reason that the record, testified to by the witness as having been made of the location of said claim, is the best evidence of the markings; and that under the law in force at the time the record was made, the law required that the markings on the ground be contained in the recorded notice of location; and for the further reason that it is immaterial, irrelevant and incompetent, and not proper redirect examination.

A. By square posts, four by four *inces*, four feet out of the ground, and a pile of rock piled around them about two feet high. That was at each one of the corners, except at the southwest corner—that was at the section-house at Wolf Creek, and that was a post set in the ground without any rock being piled around it.

Q. And the size of that latter post?

A. Four inches square and four feet out of the ground.

Q. Who established these corner markings on the ground?

A. The man I had hired and myself.

(Testimony of Albion McDonald.)

Mr. LOEB.—Object to any testimony as to the posts and markings upon the ground, that it now appears by the testimony of the witness that somebody other than himself placed the stakes.

The WITNESS.—I was right there and helped do it myself.

Q. When you used the word representation, in speaking of representing the claim, did you or didn't you refer to the doing of one hundred dollars' worth or labor and improvements, as required by the United States statutes. A. I did.

Q. When this claim was located, state as nearly as you can in the words of *Lammlein* what he said about his claim to that land.

Mr. LOEB.—Objected to as not proper redirect examination, and irrelevant, incompetent and immaterial; and for the reason that the witness having testified that he has no further claim upon the said ground as a quartz location, even if it was once material, it has now become immaterial.

A. Why, I told him I was staking a quarry claim there—

Mr. LOEB.—Move to strike out what the witness told him as a self-serving declaration.

A. (Cont'd.)—and asked him if he had any objection to it, and he laughed and said, "Go right ahead and take it out"—anything I wanted to do, as he said he had sold that ground to the Montana Central Railroad Company and it was not his any more and it didn't make any difference.

(Testimony of Albion McDonald.)

Q. You stated that you had represented that claim until you made arrangements with Trodick that covered the Reece payment—the payment to Reece. Why did you then cease further representation on the claim?

Mr. LOEB.—Complainants object on the ground that the witness having testified that the land included in the quartz location now being inquired of included ground and only ground that *Lammlein* had theretofore sold to the Montana Central Railroad Company, and inasmuch as the plaintiff Trodick does not lay any claim to the ground that *Lammlein* sold to the Railway Company; that all testimony with reference to the quartz location is immaterial, irrelevant and incompetent, and for the further reason that it is not proper redirect examination and is repetition.

A. Yes; we represented it up to about that time, and the reason I didn't represent it any further was because I thought that Mr. Trodick would get the title affirmed.

Mr. LOEB.—Move to strike out the answer of witness as being opinion evidence and a conclusion of the witness as to what he thought.

Q. But for the arrangement that you then made with Trodick would you or would you not have continued to represent the claim and assert your rights under it?

Mr. LOEB.—Objected to for the reasons included in the last two objections.

A. I would.

(Testimony of Albion McDonald.)

Q. You stated that practically all of the open bottom land that was not in vegetables was in grain before 1888. What was the acreage—the grain acreage?

A. Why, that was quite a while before 1888; that must have been in 1885, before the railroad went through there.

Q. What was the grain acreage?

Mr. LOEB.—Objected to as not redirect examination and irrelevant, incompetent and immaterial.

A. Well, I thought there was perhaps three or four acres in the bottom altogether, in the piece.

Q. Who did whatever clearing of the brush that was done in the bottom?

A. Old man *Lammlein*.

Q. Did Trodick himself do any of it? This plaintiff, I mean.

A. I don't believe I ever saw him clear any brush.

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent.

Recross-examination by Mr. LOEB.

Q. You are testifying now that you didn't see him clearing any brush; you don't want to be understood that you were watching his movements all the time.

A. No, sir; not by any means, but I would have known it if he had cleared any brush.

Q. Were you there all the time?

A. I have been there continuously since '94.

Q. Never missed a day, summer or winter?

A. I have perhaps been out of town two or three days during that time, but not more than that.

(Testimony of Albion McDonald.)

Q. You wouldn't testify as to what had transpired during the time you were gone, the two or three days at a time.

A. No, sir.

Q. How often did you go away from Wolf Creek—two or three days at a time?

A. I couldn't hardly swear to that; it would be just a trip to Helena.

Q. Never went anywhere except to Helena?

A. Oh, I have been to the Falls, or Benton, but it never occupied over a day or two.

Q. And all the time you were watching to see whether Trodick was clearing brush, while you were there?

A. No, sir; I wasn't doing anything of the kind.

Q. Did you ever see anybody clearing any brush in that vicinity?

A. Yes, sir.

Q. Other than *Lammlein*?

A. Yes, sir.

Q. Can you give the names of the people?

A. I have seen Al Trodick and Antone Rhein clearing brush on section 2—a great deal of it.

Q. Is that all the people you ever saw clearing brush in that vicinity?

A. No, sir; I have seen all of them clearing brush.

Q. Can you tell us the dates?

A. No, sir.

Q. Did you always go and investigate to see who was clearing the brush?

A. No, sir; but it was self-evident, if you were walking or riding by there.

Q. Did you go into the brush to see the man who was working there, or to see who he was?

A. You could see it from the county road.

(Testimony of Albion McDonald.)

Q. Could you see it in every instance—see the man clearing brush to know who he was?

A. No, sir.

Q. Did you have any reason for wanting to know who it was that was clearing off the brush?

A. No, sir—nothing. The reason I make that statement is because there is no brush cleared to amount to anything on 35.

Q. And it is a general idea that you have?

A. No, not very general.

Q. On which you make this statement?

A. No, sir; not very general, because if there had been brush cleared there, then, it would show now.

Q. Did you go through the brush and see if it was cleared inside of the willows?

A. It would be impossible for any brush to be cleared without my knowing it. I have been fishing up and down the creek and shooting up and down the creek, and I ought to have known what was being done there. The bottom is not so large but what you would know of it.

Q. Did you see the man putting in the fruit trees?

A. I believe I saw Mr. Trodick working at it; I know I have seen him gardening there.

Q. You actually saw Mr. Trodick there—

A. Yes, sir.

Q. Putting in fruit trees?

A. Well, I wouldn't just swear that he was putting in the fruit trees; he was preparing the ground for the trees—either he or some one helping him put

(Testimony of Albion McDonald.)

them in there, because I seen them in there afterward, and I think Mr. Trodick did it himself.

Q. Now, the ground covered by your location, as you testified to Mr. Wallace, was, as you say according to *Lammlein's* theory, on land that was within the land that he had sold to the railroad?

A. That is what he told me. He told me he had sold that land to the railroad company.

Q. Where was that quartz location with reference to the *Lammlein* house?

A. I should think five or six hundred feet east—something like that; five or six hundred feet there.

Q. East of the depot, was it? A. No, sir.

Q. West of the depot? A. Yes, sir.

Q. To the north or south of the present railroad track? A. To the north.

Q. When did *Lammlein* tell you this?

A. Oh, in '87 or '88 or '89, somewhere along there; it was a matter of general knowledge that he didn't own the land or claim it; that he had sold it.

Q. Was he living there then? A. Yes, sir.

Q. Did he have any crops in there?

A. Yes, I think he had his garden in there opposite his house, and some stuff in across the creek.

Q. Was it across the creek then?

A. Yes, sir.

Q. The creek has changed there, hasn't it?

A. Yes, sir.

Q. How far north as the creek is now and then, opposite the depot?

(Testimony of Albion McDonald.)

Mr. WALLACE.—Objected to as not proper re-cross examination.

A. About two hundred and fifty feet, I would think, right at the depot—about two hundred feet to the bank of the creek.

Q. There was a change of about two hundred and fifty feet all along the creek there, so far as its present location was concerned, in the entire *Lammlein* bottom?

Mr. WALLACE.—Objected to as not proper re-cross-examination.

A. No, sir.

Q. How much of a change was there?

Mr. WALLACE.—Same objection.

A. I couldn't tell that, because the old channel ran very crooked.

Q. The old channel ran on the other side of the present railroad track, didn't it—that is, the south side?

A. Well, for a piece.

Q. Well, for a piece below the depot?

A. Below and above.

Q. And then finally got back on this side?

Mr. WALLACE.—Same objection.

A. Yes, sir.

Q. To the point of rock down there?

Mr. WALLACE.—Same objection.

A. This side of the point of rocks—crosses on the north side.

Q. Well, then, the old creek channel was south of the present railroad track from all points from the Japanese quarters down to the point of rocks?

Mr. WALLACE.—Same objection.

(Testimony of Albion McDonald.)

A. Well, pretty close—that is, about as a general thing.

That is all.

ALBION McDONALD.

Subscribed and sworn to before me this 24th day of February, 1905.

A. K. BARBOUR,
Special Examiner.

The EXAMINER.—We will now take a recess until two o'clock this afternoon.

JOHN W. WADE, a witness called on behalf of defendant, sworn, testified, as follows:

Direct Examination.

(By Mr. WALLACE.)

Q. What is your full name?

A. John W. Wade.

Q. How old are you? A. Fifty-one.

Q. You live where? A. Helena.

Q. What is your business?

A. Civil engineer.

Q. How long have you followed that calling for a livelihood? A. Twenty-five years, nearly.

Q. What official positions have you held in Montana, and do you hold? A. In the State?

Q. Yes, anywhere—State or county.

A. I was appointed in 1882 as deputy United States Mineral Surveyor, and have been a number of times County Surveyor, Superintendent of Roads and Buildings; City Engineer and State Engineer.

(Testimony of John W. Wade.)

Q. You know this little town of Wolf Creek—the station of Wolf Creek, on the Montana Central?

A. I do.

Q. How long have you *known* it?

A. Since I came into the country—I have known the Kisselpaugh place twenty-five years.

Q. Kisselpaugh's is what they used to call Cartersville? A. Yes, sir.

Q. I show you a map, a blueprint, marked Exhibit 1 to testimony of Bickell. Did you have that with you at Wolf Creek on Saturday last?

A. Yes, sir; had an exact copy of it.

Q. For what purposes?

A. For the purpose of locating certain improvements of the Great Northern Railroad and locating the Great Northern Railroad itself.

Q. With reference to what?

A. With reference to the township line running between section 35 of township 15, north of range 4 west, and section 2 of 14 north, range 4 west.

Q. State whether or not that township line you speak of is or is not the south boundary line of section 35, township 15, north of range 4 west?

A. It is the same south boundary.

Q. Do you find that line purported to be represented on that map you now hold in your hands?

A. I find it, and it is properly located.

Q. You find it on the map before you?

A. Yes, sir.

Q. Did you determine from an actual survey on the ground whether or not the line that you have in-

(Testimony of John W. Wade.)

icated as the south boundary of section 35—so marked on the map—is correctly projected on the map as it is on the ground, and the monuments?

A. It is.

Q. What monuments did you use in arriving at that conclusion?

A. I used the quarter corner on the south boundary of section 35 of township 15 north of range 4 west, and the corner a half a mile east of that; and also another corner within the neighborhood of that; they are probably 75 feet *part* on the same line.

Q. Did you actually find the quarter corner you have spoken of and its marking on the ground?

A. I did.

Q. Did you actually find a mark a half a mile to the eastward that you have spoken of on the ground?

A. I did.

Q. And ran a line between them?

A. I did; yes, sir.

Q. With what result as to the correctness of this line shown on the map here?

A. It strikes on the bridge just as it appears there, and crosses the river as it appears there.

Q. And runs as it appears elsewhere in the map?

A. Runs exactly as it appears on the map.

Q. Now, did you locate the line of the Great Northern Railway observing it with reference to this township line as you found it, and as it appears on the map?

A. I did.

Q. Have you shown that on the blueprint?

(Testimony of John W. Wade.)

A. It is marked on the blueprint.

Q. How marked—the line of the Great Northern Railroad?

A. The Great Northern Railroad is marked with a white line, and the name Great Northern Railroad.

Q. Do you show the location of the Montana Central section-house as you found it at that station?

A. Yes, sir; I do.

Q. How marked and indicated?

A. Marked with a pink-lined square and the word "Section-House."

Q. The word "house" inside the parallelogram?

A. Yes, and the word "Sec" just outside of it.

Q. Is that correctly represented?

A. It is correctly marked and represented on the map.

Q. To the westward a building appears marked Japanese quarters?

A. The Japanese quarters or boarding-house is marked on this map west of the section-house, and the corner of it—the northwest corner of it is cut off by this side boundary of section 35.

Q. It is not actually cut off?

A. Just a little bit of it. The line cuts through it. It is cut off from this section 2.

Q. Have you correctly shown the location of that Japanese boarding-house on the map?

A. I have.

Q. And indicated it by *waht* word?

A. By the words "Japanese quarters"—"Japs quarters" and a square.

(Testimony of John W. Wade.)

Q. And now the Montana Central depot. Do you show that as it was upon the ground—on this map?

A. Yes, sir.

Q. In what way?

A. White or pinkish lined parallelogram, with the word "Depot" within it. This is the Great Northern depot.

Q. And what have you to say as to whether you correctly establish the whereabouts of that Great Northern depot, as you have shown it on the map?

A. It is exactly as it is on the map.

Q. And the water-tank; do you correctly show that and indicate it on the map?

A. I do.

Q. Indicated how?

A. With a circle, west of the depot.

Q. Marked how?

A. "W" for water and "tank" in the circle.

Q. Do you correctly establish it on the map as you found it in your survey, the coal trestle beyond the engine-room?

A. Yes, sir.

Q. If so, how indicated on the map?

A. The first to the left—west of the water-tank is a little engine-house, not quite connected with the next parallelogram here west further, which is the coal-bin, marked "bin" inside the parallelogram. The engine-room is marked "eng" just above the square and the word "room" within the square—representing the engine-house.

Q. And the trestle?

A. The loading trestle is in a parallelogram with horizontal marks across it, indicating the trestle,

(Testimony of John W. Wade.)

upon which loads are taken to the east—and this is still further west, the whole thing including the point of the trestle being something like two hundred feet in length.

Q. Now, have you described to us all of the changes that you made upon this map, Exhibit 1, to Bickell's testimony—after it came into your hands?

A. I have makred a little change in the creek—it is not a material one—toward the east. The creek doesn't run as far north as it was represented. I have indicated the departure line by a white line.

Q. White or pink?

A. Pinkish line, showing that the creek turned to the right as it went downstream, southerly from where it was located. It is not a material change, and doesn't touch any of the other improvements. It is the only thing I changed.

Q. In all other respects, save the matters you have now enumerated, is the map the same as when it came into your possession?

A. Exactly the same.

Q. Aside from the point you have indicated as the change in the creek channel, what did you find as to the actual line of the stream, with reference to the purported line on the map?

A. The stream is represented exactly as I found it. The pencil line indicating the center as nearly as I could make it of the river, as you look up the river; and the pencil line going toward the south—that is, down the creek—indicates, as near as I could, the center, going that way.

(Testimony of John W. Wade.)

Q. And what have you to say as to the correct representation of the bridge, as you found it on the ground?

A. It appears exactly as I found it on the ground.

Cross-examination.

(By Mr. LOEB.)

Q. Why was it that you didn't show the railroad track west of where it intersects with the south boundary line of section 35?

A. Well, I hadn't time to go any farther; it was all the time I had.

Q. Who told you to go down there?

A. Mr. Bullard asked me to go down there.

Q. Did he tell you to show anything in section 35?

A. He didn't even say anything about showing what was in 2 except the improvements of the Great Northern.

Q. Will you mark the *Lammlein* house on this plat?

A. The *Lammlein* house?

Q. The Trodick house.

A. You couldn't do it on this map—if you mean the one that is south of the railroad.

Q. I mean the *Lammlein* house in section 35—the one where Mr. Trodick lives.

A. I don't know where Trodick lives—I don't know the *Lammlein* house.

Q. You don't know where Trodick lives?

A. No.

Q. You weren't told to ascertain and put on this map the Trodick house, were you?

(Testimony of John W. Wade.)

A. Mr. Bullard asked me to tput some of these things on—as much as I had time, and he asked me if I had located them when I came back.

Q. You couldn't tell us where the Trodick house is?

A. I couldn't tell you, because I don't know.

Q. How do you know that the section line as shown on this map is correctly shown on this map?

A. I am not prepared to swear with reference to all these lines on this map, because I didn't run the lines, all these lines of these streets; but relative to the creek and to the railroad and to these improvements which I have indicated, and to this bridge, this line is exactly as it lays on the ground this section line.

Q. Did you run that line yourself?

A. Yes, sir.

Q. You don't know that that line is correctly shown with reference to lot 5 block 2, do you?

A. No, sir.

Q. And you wouldn't swear the line is correctly shown with reference to any of the lots that are shown as a part of the Auchard townsite of Wolf Creek—as this map purports to be?

A. No, sir. I want to say—

MR. WALLACE.—I ask the Master at this time to instruct the witness that he has the privilege of completing his answer.

A. I want to say to you that I know that all of this Auchard plat is north of the river as it here runs, because I set my instrument on the section line in the

(Testimony of John W. Wade.)

street known as Auchard Avenue at the point where the same cuts this south boundary of section 35 and took an angle into the street, and I also ran the line from this point where I set the instrument in the street, where the easterly end of Auchard Avenue cuts this south boundary of 35 and ran the line from there southerly, and I know that all of this platted ground, as it appears on the blueprint, is north of the river as it here appears.

Q. You also know, then, that all of the buildings on any of the land in the present town of Wolf Creek—

A. Is north of the river.

Q. Is north of the river and is north of the south boundary line of section 35?

A. Yes, sir.

Q. And you can't give us the distance, can you, from the line you marked Great Northern Railway track—from the point marked water-tank, to the bridge?

A. Yes, sir.

Q. How far?

A. From the water-tank to the bridge, 190 feet; that is, to a point on the bridge, which I have indicated there as crossing.

Q. That would be where the line crosses the bridge at that point?

A. Yes, sir.

Q. It would be 190 feet, then, at a point north and south between the water-tank and the bridge?

A. Yes, this is supposed to go to the center of the water-tank, as near as we could estimate—within a foot or two of it.

Q. That would be 190 feet from the south boundary of section 35 to the water-tank?

(Testimony of John W. Wade.)

A. Yes, sir.

Q. Now, will you measure 190 feet north from the point where the Great Northern Railway track intersects the south boundary line of section 35?

A. One hundred and ninety feet would reach into lot four a few feet.

Q. One hundred and ninety feet north of the railroad track at a point where the railroad track intersects the south boundary of section 35, would bring it into lot four of block two of the Auchard townsite—or of the Wolf Creek townsite?

A. I think so.

Q. The Japanese quarters are partly in section 35, aren't they?

A. Just a small portion of the northwest corner.

Q. One hundred and ninety feet north from the railroad track at the point where the Japanese quarters is located would bring it into lot 7 of block 2, wouldn't it?

A. Yes; somewhat into lot seven I should estimate.

Q. Did you project the line of the railway west of where the railroad track intersects the south boundary line of section 35?

A. No, sir.

Q. Why didn't you do that?

Mr. WALLACE.—Objected to as repetition.

A. For the reason that I didn't have any occasion to project it any further—the line turns off after it makes this intersection to the left—to the south.

Q. You didn't have any occasion to do it? You mean you were not instructed to do it?

(Testimony of John W. Wade.)

A. My instructions were to locate the railroad at this point near the bridge and these improvements.

Q. Were you told to locate the railroad at any other point except that bridge?

A. No instructions as to how far to project the railroad over here, but with reference to the location of the bridge and the railroad track with reference to this south line of section 35, rather, and to be sure and show the point on the bridge where it crossed, and to show the improvements of the Great Northern railroad in that vicinity; those were about my instructions.

Q. You were not told to show the Great Northern Railroad track at the point where it went into section 35, then?

A. No. It wasn't mentioned at all—thirty-five, or two either, only with reference to this projection.

Q. Did you use the scale shown on this map?

A. Yes, sir; seventy-five feet to the inch—allowing a little for shrinkage.

Q. What do you mean by allowing for shrinkage?

A. Well, on the tracing from which the blueprint is made—I have not seen the tracing, but I know it always is so that the blueprint will not show as large a space of any given lot, for instance, or as large a length of line for any given line as the tracings themselves will; there is a little shrinkage in the paper, so I made each one of my distances a little shorter so as to conform to this plat.

(Testimony of John W. Wade.)

Q. You are satisfied from the survey that you made that lot 1 of block 2 is in the south half of section 35, are you? A. Yes, sir.

Q. That is true of lot 2 of block 2, is it?

A. Yes, sir.

Q. Three? A. Yes, sir.

Q. Lot 4, and lot 5 and lot 6 and lot 7 and lot 8 and lot 9 and lot 10, and lot 4 of block 4—in fact, it is true of all of the land portrayed on this map as the town-site of Wolf Creek, Lewis & Clark County, Montana—that they are all north of the south boundary line of section 35, township 15, north of range 4 west?

Mr. WALLACE.—Objected to as repetition.

A. Yes; I have said and I say again that the whole of this plat, this ground as here platted, is north of the section line—the south boundary of section 35.

Q. Are there any buildings south of that line that you saw that you didn't put on the plat?

A. Yes, sir; there was one building—it would not appear on this plat—it was too far away; but in going toward the east on this line, the south boundary of section 35 and climbing the hill here, I saw beyond the railroad track a building; I don't know whose it is.

Q. You don't know what section it is there—you didn't ascertain how far it was?

A. I didn't ascertain how far it was, but I know it is in section two.

That is all.

Mr. WALLACE.—The map exhibit 1 to testimony of Paul S. A. Bickel is offered in evidence by defendants.

Mr. LOEB.—We would like to inquire of counsel for what purpose it is offered?

Mr. WALLACE.—It is offered in connection with the testimony of the witness Wade and in connection with the testimony of all other witnesses who have either on direct or cross-examination testified from the map; and in compliance with the demand that counsel for complainant made when the map was first identified.

Mr. LOEB.—Complainant objects to the offer of the map as changed by the witness Wade, for the reason that the railroad track as shown on the map by the witness Wade is the railroad track as it now exists, and that the testimony is undisputed and the fact is undisputed in this case that the railroad tracks have been changed from their original location in the year 1891 or 1892. No objection to the introduction of the map before the witness Wade put on the map the railroad track as it exists at the present time, the objection being to the location on the map, upon an exhibit in this case, of the railroad as it now exists, when the deed from *Lammlein* to the railroad company referred to the railroad track as it was originally to be located and before the flood of 1892.

Mr. WALLACE.—Without insisting upon the identity of location of the track now as before 1892, and conceding the fact of removal, and further con-

ceding that the track as now shown by the witness Wade is the track as he found it on the survey on Saturday the 14th, counsel for defendants reserve the right to show the Court by affidavit to be filed hereafter that the changes made by the witness Wade upon this map were with the distinct understanding on the part of counsel that the matters shown by the witness Wade might be projected upon the map, and that the map was by consent of counsel delivered to him for that purpose.

Mr. LOEB.—Counsel for plaintiff reserve the right to show by affidavits hereafter that the consent given to Mr. Bullard to withdraw the map and to have the witness use it was with the direct understanding that the witness Wade would locate all points upon the map other than the railroad track, and that the witness Wade did not locate anything upon the map other than the railroad track.

Mr. WALLACE.—To which the defendants reply that they will have no objection, if counsel for plaintiff shall desire it, that he himself shall procure from the witness Wade the location of any additional points he may desire located on the map, not, however, conceding that the understanding required the location of any additional matter beyond that shown on the map.

Now, we offer as a part of the evidence a stipulation made concerning the survey of section 36 in the same township and range as the southeast quarter of section 35, under investigation here, and ask that it be identified and incorporated in the record.

The EXAMINER.—I will mark it Defendant's Exhibit A-3.

Mr. LOEB.—The objection of the complainant appears in the stipulation.

The EXAMINER.—Pursuant to the understanding that the witness Wade should be permitted to go down to Wolf Creek with the blueprint map, to make certain other measurements desired by the complainant, and by consent of counsel for the respective parties, the testimony taken to-day can be included in that written on the 16th.

J. W. WADE. recalled—Examination by Mr. LOEB.

Q. Mr. Wade, when you were on the stand before you testified as to having made certain measurements, and there were certain other measurements that I asked for that at that time you were unable to give. Have you been down to this neighborhood since you were on the stand before? A I was.

Q. Have you since that time located the *Lammlein* house? A. I have.

Q. Where did you find the *Lammlein* house on Exhibit 1 to the testimony of Paul S. A. Bickel?

A. The *Lammlein* house is on lot 4 of block 1.

Q. And did you find the town hall down there?

A. I did, just opposite this on the other side of Auchard Avenue.

Q. And where would that be?

A. That would be on lot 5 of block 2.

(Testimony of John W. Wade.)

Q. Now, did you make some measurements so as to show what portion of section 35 was included in the *Lammlein* and Trodick occupancy?

A. I made some rough measurements there.

Q. I will ask you whether you drew the plat that I am now showing you, as showing the measurements you made?

A. This is a sketch from my rough measurements.

Q. Now, that plat shows the location of the land from Wolf Creek on the west, does it, to where the bluffs come into the creek on the east?

A. Tes, sir; where the road is driven close to the river by the bluffs.

Q. And that is below and east of the railroad station approximately, how many feet—these bluffs.

A. Probably six or seven hundred feet.

Q. Now, this plat, which the Examiner can now mark—

The EXAMINER.—I will mark it Plaintiff's Exhibit X to the testimony of J. W. Wade.

Q. This plat *show* the ground, does it, north of the section line—the south boundary of township 15, I think, range 4 west, section 35, and the bluffs to the north?

Mr. BULLARD.—You are now referring to the sketch made by the witness and marked exhibit X for complainant, are you?

Mr. LOEB.—Yes.

A. Yes—do you mean between the bluffs and the south line?

(Testimony of John W. Wade.)

Q. Yes. The land from the south line to the bluffs.

A. The sketch is intended to show that the bluffs are broken—that there is a line of bluffs or apexes of mountains which stops just north of the north boundary of the southwest of *the southwest* of this section; also a prominent ridge just east of that, due east of that, just north of the north line of the southeast of *the southeast*, and it was at these two points that I stopped as a crest. I didn't go on to the main crest in the middle of the section.

Q. The main crest that you speak of is a considerable distance north of this first line of bluffs?

A. Yes; about 1800 feet.

Q. Your measurements were from the first bluffs to the north of the section line? A. Yes.

Q. Now, can you tell us approximately the number of acres that would be included in the land that you have marked in black on this plat—Plaintiff's Exhibit X in the testimony of John W. Wade—north of the section line?

A. Yes, sir; it is one hundred and two acres, or thereabouts.

Q. I will ask you what the point that you have marked on your plat "Garden" refers to?

A. This was a garden pointed out to me as the *Lammlein* garden.

Q. North of the *Lammlein* house?

A. North of the *Lammlein* house—yes, north of the *Lammlein* house.

(Testimony of John W. Wade.)

Q. Approximately, how many feet is the garden north of the *Lammlein* house?

A. It is north of the *Lammlein* house about seven or eight hundred feet—maybe nine hundred feet.

Q. Now, how would you described the *Lammlein* or Trodick occupancy—as included north of the south boundary of township 15, north of range 4 west, section thirty-five?

A. I have no evidence at all as to the Trodick or *Lammlein* occupancy.

Q. Well, how would you describe the land north of the south boundary of township 15, north of range four west of section 35, between Wolf Creek on the west and where the point of these bluffs *stricked* the creek on the east, and bounded on the north by the first bluffs?

A. I would describe it as now laying in these black lines, provided I connect the bluffs on the west with the bluffs on the east with a straight line, I would describe it as follows: I would begin at the southeast corner, which is a point on the section line between two and section thirty-five under consideration, seven hundred and three feet west of the southeast corner of section 35, thence running north fourteen hundred and thirty-one feet—it would be understood that all these measurements were roughly made. Thence westerly thirty-one hundred and eighteen feet, thence southerly fourteen hundred and thirty-one feet, to the south boundary of *section*, thence easterly on the section line thirty-one hundred and eighteen feet to the place of beginning.

(Testimony of John W. Wade.)

Q. Now, Mr. Wade, the northern boundary, of course, would be somewhat erratic owing to the projection of the bluffs here and there, wouldn't it?

A. Yes, sir.

Q. So that you would run the line instead of straight on the northern boundary along the top of the bluffs—that is, it wouldn't be a straight line as if you had drawn it on the map?

A. No, sir. Because the bluffs don't run that way.

Q. Don't run that straight?

A. There is a coulee, I would call it, running up due north of the *harden* north of this *Lammlein* house, north—due north, extending up the bow into the ridge, so that the main or highest point of the ridge would be 1800 feet as I have estimated it north of the northerly boundary line of the tract just described.

Q. Within a few rods your measurements of that north line are practically correct?

A. You mean the distance over the north line of this tract?

Q. That is the distance from the south line of township 15, north of range 4 west, section 35, to this point marked north line?

A. My measurements are within a few feet, not rods, but it is correct within a few feet from the south boundary of 35 to the point where I observed the summit of the ridge to the west.

Q. So within a few feet, the distance from the bluffs to the north, to the south boundary line of

(Testimony of John W. Wade.)

township 15, north of range 4 west, section 35, would be 1431 feet?

A. Yes, sir; I measured that quite accurately; that is the best I could, looking eastward up on top of the mountain and westward without being on top of the mountains, where this portion of the mountain range which extends eastwardly and westwardly would coincide one with the other, and I stopped there as a northerly line and made the measurements asked accurately down to the point where I stopped.

Q. A surveyor taking these measurements, other than yourself, could go down on the ground and locate that land, could he?

A. Taking this description he could locate that exactly; this description would call for an exact piece of ground of that section 35, which could be mathematically described and measured out.

Mr. LOEB.—We now offer in evidence this plat made by the witness as a part of his examination.

Cross-examination by Mr. BULLARD.

Q. Under whose direction did you make the measurements to which you have just referred?

A. Under the direction of counsel for defendant—I guess it is the plaintiff, isn't it, Mr. Loeb?

Q. And under his direction you included in it the greater part of the southeast quarter of section 35?

A. I don't understand.

Q. It was under his direction that you included in your measurements the greater part of the southeast quarter of the southwest quarter of 35?

(Testimony of John W. Wade.)

A. I should say rather that he asked me to take a line—to measure a rectangle whose westerly boundary should be near Wolf Creek; that is all.

Q. It was because of his direction that your estimate does include the greater part of the southeast of the southwest of 35?

A. Yes; because he stated to me that the westerly boundary of this tract occupied by *Lammlein* was bounded at a point near Wolf Creek.

Q. Was this the only information that you had as to the Trodick or *Lammlein* occupancy?

A. No, sir; I was told also by Mr. Loeb that his occupancy reached from bluff to bluff, north and south.

Q. Yes; what I mean is, is your information as to the *Lammlein* or Trodick occupancy confined to the information you obtained from Mr. Loeb?

A. Entirely, and I had no evidence on the ground as to the occupancy.

Q. What is the nature of the land between the south boundary of the southeast quarter of section 35, and the north boundary of the tract that you have described?

A. It is quite hilly; there is only a portion of the tract that is even comparatively level, and that is in the bottom and is occupied principally by the tract that appears on the townsite as the townsite of Wolf Creek—this exhibit to Mr. Bickell's testimony; that takes the greater part of the flat; so that there would be one hundred and fifty—would be about four hundred feet, four to six hundred feet of level ground

(Testimony of John W. Wade.)

down to this south boundary of 35—four to six hundred feet of level ground; the rest would be comparatively hilly.

Q. Then, as I understand you, practically the only portion of the land that you have described—that is properly called bottom land—is that which is occupied by the Wolf Creek townsite, as shown upon the plat introduced as an exhibit to Mr. Bickell's testimony? A. Yes, sir.

Redirect Examination by Mr. LOEB.

Q. I am the Mr. Loeb that you referred to as having gone to Wolf Creek with you? A. Yes, sir.

Q. And what I told you, Mr. Wade, that I wanted was substantially as follows: I asked you to give me a surveyor's description of land that would be embraced north of the south boundary of township 15, north of range 4 west, section 35, and lying between Wolf Creek on the west and a point where the bluffs come into the creek on the east, and from the bluffs on the north to the section line on the south?

A. Yes; that is just about what you asked me to do.

Q. I told you, didn't I, that Mr. Ralston had testified in this case that *Lammlein's* occupancy included everything from bluff to bluff, north to south, and from Wolf Creek on the west to where these bluffs come into the river on the east?

Mr. BULLARD.—Objected to as incompetent, immaterial and irrelevant—the statement of counsel as to the testimony of witnesses is wholly inadmissible at this stage of the proceedings.

(Testimony of John W. Wade.)

A. Yes, sir.

Q. And I asked you, didn't I, Mr. Wade, to make measurements so that you could give me an engineer's description of that tract which Mr. Ralston had so described on the ground?

A. I think those are about your words.

Q. And it was consequent upon that request made upon my part that you made this plat?

A. Yes, sir.

Q. And these measurements?

A. That is right.

Q. Now, Mr. Wade, I notice that you have a red line drawn north and south through the center of section 35?

A. Yes, sir.

Q. Could you now give us a description of the land east of the red line, and included within the description that you have heretofore described as being the land that I asked you to locate by engineer's description?

A. That red line is a subdivision line running from the south quarter corner to the north quarter corner, and with that explanation as to that red line I would say that I can.

Q. Well, now, please give us a description of the land included east of the red line and in the southeast quarter of section 35 and within the tract that you have already described.

A. Yes, sir; it would be described as follows: Beginning at the same point where the other beginning was made, 703 feet west of the southeast corner of section 35, running thence north 1431 feet, thence

(Testimony of John W. Wade.)

west 1937 feet, thence south on the red subdivision line 1431 feet to the quarter corner on the south boundary of 35, and thence easterly along said southerly boundary of 35 1937 feet to the place of beginning.

Q. Now, you were asked by Mr. Bullard something about the character of the land lying between the *Lammlein* house and the south boundary of section 35, township 15, north of range 4 west—

A. Yes, sir.

Q. And I understood you to say that there was four hundred to six hundred feet of level ground there? A. That is northerly and southerly.

Q. Then there is a raise, is there?

A. You climb almost immediately from there.

Q. A little upland and then another flat on which the garden is situated?

A. Yes; a small bench, and then that bench extends—sloping, you might say, up into this gully, broken somewhat toward the center of section 35; but the level ground proper closes, with the exception of this little bench that the garden is situated on—the level ground proper fades into the foothills—is cut off by the foothills a short distance north of the *Lammlein* house.

Q. That would be about from four to six hundred feet north of the section line? A. Yes.

Q. Now, this level ground up and down Prickly Pear Creek from Wolf Creek on the west to where the mountains come into the creek on the east?

A. Yes, sir.

(Testimony of John W. Wade.)

Q. And it is practically four to six hundred feet up and down—all level ground?

A. Yes, sir; except where it was torn up by the creek and the railroad.

Q. And this level ground that you referred to as level ground—do you mean creek bottom land?

A. The creek bottom proper.

Q. And the land on which the garden is situated—that is what you would call a bench?

A. Yes; there is a little bench that the garden is set on.

Q. The altitude, you mean, is a little higher than the bottom ground?

A. Yes, it is on a little higher ground.

Q. Now, did you form any idea, from looking at the ground, as to whether at one time where the present townsite of Wolf Creek is located and where Mr. Auchard platted this townsite, there was or was not meadow land there?

A. There is no reason why there should not have been; it was all bottom land, and it was torn up by the railroad, and washed out by this big freshet they had in '92; there is no doubt it was a very rich bottom land.

Q. And that condition existed up and down the creek for four to six hundred feet north of that section line until you strike the first rise or the bench ground?

A. I should say that it could so exist. I don't know anything about it; but I should guess it did.

(Testimony of John W. Wade.)

Q. Now, did you see any evidence when you were down there of the railroad track ever having been further north than the main track where it now exists?

A. Well, I don't know. I did see evidences of a ridge north of the railroad track, but that might have been thrown up as a dike; I can't say what that was thrown up for.

Q. But there is an embankment some twenty feet—how far is it going north from the Great Northern railroad?

A. Probably twenty to thirty feet north of the railroad track.

Q. Then, some twenty or thirty feet north of the present railroad track, there is what appears to be a bank which might have been an old railroad track?

A. Yes; I suspect it was, but I don't know.

Q. Of course you have no means of knowing, but your experience as an engineer leads you to believe that it was at one time a railroad track?

A. I wouldn't be at all positive; I would say it was either an old abandoned railroad track, or dump, or dike to protect the new track—if it was changed there—to protect the track from the ravages of the water—a dike. It looks, though, as if it might have been an old railroad bed.

Q. Did you see evidences to the south of the present railroad track as to whether or not the creek had at one time run south of the present railroad track?

A. I don't doubt that it did; there is a deep depression there in the ground where at some time

(Testimony of John W. Wade.)

water certainly has run, on the south of the railroad track, opposite the present station in this townsite of Wolf Creek.

Recross-Examination by Mr. BULLARD.

Q. As a matter of fact, isn't it true, Mr. Wade, that this little bottom that you speak of narrows down very perceptibly and comes to a point before it reaches the bluffs.

A. It comes almost to a point there.

Q. Somewhat indicated by the shape of the townsite lines?

A. Yes; all these lots in block three are somewhat on the hill there; half of the length of these are on the hillside.

Q. So at that point the valley narrows very closely to a point? A. Yes, sir.

Redirect Examination by Mr. LOEB.

Q. But none of the lots marked on the Auchard townsite of Wolf Creek that you have referred to several times in the exhibit to Mr. Bickell's testimony, west of the bridge, are at all affected by the bench land, are they—are they not all in the bottom land proper?

A. I think not—my impression is from the fact that I measured from the front of lot 6—my measurements began there and we began to climb the hill the minute we passed the hotel, which lays on 6 and 7; there were a number of these would lie on the foothills; a small portion.

(Testimony of John W. Wade.)

Q. But all of the land lays between *Lammlein's* garden and the south boundary of township 15, north of range 4 west?

A. Oh, yes; because the garden is probably five or six hundred feet beyond the north end of these lots represented on this plat—on this Wolf Creek townsite plat. But you notice that this is rising ground between the *Lammlein* house and the garden, a foot-hill before you get there and then you get on the bench.

Q. But the four to six hundred feet, though, that you have reference to is the bottom land, irrespective of bench land. Is that correct?

A. I am speaking of a point opposite the old *Lammlein* house from the section line.

Q. How far would it be there?

A. Four to six hundred feet—the distance across the townsite from the north boundary, say, to the Little Prickly Pear Creek is say about 360 feet. Just the townsite itself.

Q. It would be three hundred and sixty feet from the Little Prickly Pear?

A. To the north boundary of the townsite proper.

Q. But I am speaking, measuring from the south boundary of the section.

A. If you measure now from the south boundary of the townsite, which is the north line of the Little Prickly Pear Creek, back to the line, you have say one hundred and fifty feet more.

Q. Say practically about five hundred feet?

(Testimony of John W. Wade.)

A. About that—five or six hundred feet I said a little while ago; it may be more than that because this portion of the bottom is wider than anywhere else.

Q. So just opposite the *Lammlein* house is the widest part of the bottom? A. Yes, sir.

Q. That is, at a point north and south opposite the *Lammlein* house is the widest portion of the bottom? A. Yes.

Q. Then there is a slope of the bench land—the beginning of the bench land is practically as indicated by the north boundary line of the townsite—in about that shape? A. The bottom is; yes.

Q. That is, you would take it that the parties who platted the townsite undertook to plat the bottom there irrespective of the bench?

A. Well, I should say that they undertook to keep in the bottom sufficiently to have at least building room in front of this upper land; you noticed that most of these buildings from the *Lammlein* house to the hotel—wherever there is any attempt at a building they excavate into the bluffs.

Q. You mean would excavate into the bench land?

A. Yes, sir.

Q. You don't mean by the bluffs, the bluffs you referred to as having measured to yesterday?

A. Oh, no.

Q. How many feet further are those?

A. Those are eighteen hundred feet north of where stopped with this line—that would be near-

(Testimony of John W. Wade.)

ly half a mile north of the northern boundary of the townsite land.

Mr. BULLARD.—He means these bluffs.

The WITNESS.—Oh, that would be probably one thousand feet further.

Q. The front of all lots on Auchard Avenue, on which the *Lammlein* house faces, is all in the bottom land, is it? A. All in the bottom proper.

Q. And the excavation, if any at all, is but a few feet into the bench?

A. Yes, that is what I would say, only ten or fifteen feet, where they build a house sometimes—well, there are not many houses between the *Lammlein* house and the hotel, but I noticed a few where they had excavated in order to get ground enough for them to build on.

Recross-examination by Mr. BULLARD.

Q. Then the rear parts of these lots in the Wolf Creek townsite are not in the bottom, but climbing the hill? A. Yes.

Q. And what do you estimate the elevation of the little garden you have referred to north of the *Lammlein* house, above the bottom?

A. I should say seventy-five or one hundred feet higher.

Redirect Examination by Mr. LOEB.

Q. What you mean by the lots climbing the hill is that this bench comes down to the bottom land, and there is a raise in the bench land above the bottom land some seven or eight feet?

(Testimony of John W. Wade.)

A. No, twenty-five feet there.

Q. Twenty-five feet. Is it a gradual slope?

A. Gradual slope.

Q. You don't mean to say that it was an abrupt slope?

A. No, it was a gradual slope. I would express it this way; that the upper bench sets on the north part of these lots in block 5 and block 3.

Q. How much of the upper bench sets on these lots, or how much is covered? A few feet I understood you.

A. No, I said excavated a few feet. I should estimate the bench—I didn't measure it—I should say the bench would be considered as setting down on about half of these lots.

Q. The bench you refer to is the identical bench on which the *Lammlein* garden is located?

A. It would be hard to say it was continuous.

Q. You didn't see any other benches?

A. No, but it is broken ground with a ravine coming down to the southwest—that is my recollection, that the bench is not continuous from the *Lammlein* house; even when you get on the bench it is not continuous.

Q. You mean it has its ups and downs?

A. Yes; you couldn't use the ground between the *Lammlein* house and the garden.

Q. You could use it for pasture?

A. Yes, but not as cultivable ground.

Q. That is what you meant by your answer?

(Testimony of George W. Houghton.)

A. Yes, sir.

That is all.

JOHN W. WADE.

Subscribed and sworn to before me this 20 day of
February, 1905.

A. K. BARBOUR,
Special Examiner.

The EXAMINER.—The hearing will stand adjourned until Tuesday, January 24th.

GEORGE W. HOUGHTON, a witness called on behalf of defendant, sworn, testified as follows:

Direct Examination.

(By Mr. WALLACE.)

Q. State your full name.

A. George W. Houghton.

Q. How old are you? A. Forty-seven.

Q. Where do you live? A. In Helena.

Q. How long have you lived here?

A. Well, I have had a home here—I suppose that is what you want to know—since I first came, sixteen years.

Q. How long have you lived in Montana?

A. The same time—sixteen years.

Q. What is your present business?

A. Traveling for A. P. Curtin.

Q. Were you ever in the employ of the Montana Central Railway Company? A. Yes, sir.

Q. During what years?

A. I think I began with them in 1888. I can't tell the months.

(Testimony of George W. Houghton.)

Q. In what capacity?

A. I began with them as agent and operator.

Q. Where?

A. Well, my first work was here in Helena, in the city ticket office; then I went to Wolf Creek.

Q. When, about, did you get to Wolf Creek?

A. In the year 1888; I can't tell the month.

Q. How long did you remain there in the service of the Montana Central? A. Two years.

Q. So that you left that service in 1890 at Wolf Creek? A. Yes—I should think so.

Q. What was the nature of your employment for the road at Wolf Creek?

A. I was their agent—had full charge of the business at Wolf Creek.

Q. Where did you live and make your home during the time you were agent of the Montana Central at Wolf Creek? A. In the depot.

Q. Do you know John Trodick, the plaintiff in this action? A. Yes, sir.

Q. Where did you first become acquainted with him?

A. I became acquainted with him in Wolf Creek. I don't know the month or the year.

Q. Did you have a certain business transaction with him at Wolf Creek? A. I did.

Q. When did you have it?

A. In the year 1889.

Q. How long after you had first become acquainted with him?

A. I can't tell the date at all.

(Testimony of George W. Houghton.)

Q. What was that transaction?

A. Well, I sold him the property I bought from the *Lammlein* estate; and sold him other things in the way of merchandise.

Q. You spoke of the property that was bought from the *Lammlein* estate. Do you know whether there was ever any administration of the estate of *Lammlein*? A. I don't know.

Q. Whom, personally, did you deal with in acquiring that property?

A. I dealt with Mrs. *Lammlein*, through Martin Molitor.

Q. Was your transaction personally with Mrs. *Lammlein* or personally with Molitor?

A. It was personally with Mrs. *Lammlein*—well, my personal work—that is, the agreement *and* of course was made through Molitor.

Mr. LOEB.—We object to this as immaterial, irrelevant and incompetent, as to what the relations were with Molitor and Mrs. *Lammlein*.

Q. Was there any writing, or was the arrangement verbal?

Mr. LOEB.—I suppose it may be considered that all this line of testimony is objected to.

A. It was oral—not writing.

Q. You spoke of acquiring the property; did you acquire it in a representative capacity, or outright yourself?

(Testimony of George W. Houghton.)

A. A representative capacity, as I understand it, would be representing some one else?

Q. Agent for some one else.

A. I bought it myself and paid for it.

Q. How much did you pay for it?

A. I can't tell you.

Q. Did you pay for it in cash, or service, or trade?

A. I paid for it in cash.

Q. You say you afterwards sold him this property—the plaintiff, John Trodick?

A. Yes, sir.

Q. Do you know when you sold this property to John Trodick?

A. I have the date; I have it in a book. May I look at my book?

Q. Certainly.

A. Yes, sir; August 28th, 1889.

Q. And for what price?

A. Five hundred dollars for the buildings, etc., and then there was sixty dollars for furniture, making five hundred and sixty dollars.

Q. Who owned that furniture that you sold at sixty dollars?

A. It was owned by the same party who owned the place—by *Lammlein*.

Q. When you sold the furniture did it belong to you—did you buy it? A. Yes, sir.

Q. Did you buy the furniture as a part of the property you bought in this trade with Molitor?

Mr. LOEB.—Objected to as leading in addition to the objections heretofore given.

(Testimony of George W. Houghton.)

A. All bought together.

Q. Was this furniture acquired in the same or a different trade as you have heretofore spoken of?

A. The same trade.

Mr. LOEB.—Objected to as leading in addition to the objections heretofore given.

Q. Had you had any previous transactions with John Trodick prior to this sale, or was this the first one of the business transactions?

A. I had an understanding with John Trodick before this; whether I sold him any goods before that or not, I don't know.

Q. You don't know whether you had sold him any goods or not?

A. I don't hardly think I did, but I can't say as to that.

Q. Did you make any book entry of this sale to Trodick at the time?

A. Yes; I had my book accounts.

Q. What have you to say as to whether that book account was the regular book account kept by you in your business?

Mr. LOEB.—Same objection.

A. Yes, sir; it was kept in my business.

Q. Who made the entries in it?

A. I think I made all of them.

Q. When were they made with reference to the occurrence of the transactions that they purported to record?

Mr. LOEB.—Same objection.

A. Now, I believe I said August 28th.

(Testimony of George W. Houghton.)

Q. No, I am not asking you as to that particular entry. I am speaking generally of these entries in that book. Read the question again, Mr. Stenographer.

(Question read to witness.)

A. At the time the transactions were made.

Q. Can you produce that book now?

A. Yes, sir.

Q. I wish you would do so and turn to the page that covers the John Trodick account that you have spoken of.

Mr. LOEB.—Same objection.

(Witness does so.)

Q. That is on what page?

A. Page 183, the beginning of it.

Q. I wish you would hand the book to the Examiner in order that he may mark it on the page that you have indicated.

The EXAMINER.—This will be marked Defendant's Exhibit A-4.

Q. Now, is that account continued to any other page in that book?

A. It is continued to page 27, I think.

Q. Will you refer to the continued page of that account, in order that the Examiner may mark that also?

A. It was 28 here and it should be 27.

The EXAMINER.—I will mark that also Defendant's Exhibit A-4, page 27.

(Testimony of George W. Houghton.)

Q. Do or do not the two pages that we have alluded to cover the entire account of John Trodick as the same appears in that account-book?

A. It covers the whole account except a balance that he has paid since; that does not appear in the books.

Q. I say, is there anything else with John Trodick on the book on any other page—does it cover your account as it appears on this book—the two pages?

A. Yes; that is all.

Mr. WALLACE.—Then I offer these two pages of that account-book in evidence.

Mr. LOEB.—The same objection is urged to the introduction of these two pages of this account-book in evidence as was urged to the entire line of questioning of this witness Houghton—as irrelevant, incompetent and immaterial.

Mr. WALLACE.—I suppose we may stipulate that these two pages may be copied into the record and the book withdrawn?

Mr. LOEB.—Subject to the objection by complainant's counsel to the admissability of the entire line of testimony given by the witness, the pages in the book may be copied by the stenographer, in lieu of the original pages and the book itself withdrawn.

Q. Did you sell this property to John Trodick at the same or a different price from what you paid for it? A. At a different price.

Q. Higher or lower? A. Higher.

Q. Do you remember what you sold it to John Trodick for?

(Testimony of George W. Houghton.)

A. Five hundred dollars—that is the record of it; that is the only record that the book shows.

Q. Now, what was the price to Trodick of everything you sold him in that trade—furniture and all?

A. All this stuff here?

Q. No; that you sold him at that time; all there was in that one deal?

A. Five hundred and sixty dollars.

Q. How did Trodick pay you at the time—what did he pay you?

Mr. LOEB.—Same objection.

A. He paid me some cash and some work.

Q. Have you any entry of the payments as made and showing how made in the account that you have alluded to?

A. I think it shows, cash, work, etc.

Mr. LOEB.—Same objection.

Q. What is the first entry on the debit side of that account, the item of \$500.00—what does it allude to?

A. It alludes to the property—the *Lammlein* property.

Mr. LOEB.—Same objection.

Q. The property exclusive of the furniture, or inclusive of the furniture?

A. Exclusive—the first entry.

Q. The same or different property that you had acquired from Molitor?

A. The same property that I acquired from Molitor.

(Testimony of George W. Houghton.)

Q. State whether or not when you sold this property to John Trodick, you were in any manner representing the deceased—*Lammlein*—or his widow, Mrs. *Lammlein*, in that sale to Trodick?

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent.

A. I in no way represented any one but myself.

Q. Who, at the time of that sale, was the sole owner of the property that you then sold to John Trodick—this plaintiff?

Mr. LOEB.—Same objection.

A. I was the owner, so far as could be, at that time.

Q. What period of time intervened between the time of your paying Molitor for this property and August 28th, 1889, when, as the book shows, you sold to Trodick?

Mr. LOEB.—Objected to as immaterial, irrelevant and incompetent.

A. I can't tell.

Q. Was it a year? A. I am unable to say.

Q. Ten years? A. Less than ten, probably.

Q. Approximate it as close as you can.

A. Well, I should think it would be less than a month.

Q. Was any part of this purchase price, at any time, before it was finally paid, evidenced by any promissory notes?

Mr. LOEB.—Same objection.

A. Yes, sir.

(Testimony of George W. Houghton.)

Q. And if so, state the entries in the Trodick account in your book of accounts that relate thereto, and the kind of ink in which they appear.

Mr. LOEB.—Same objection.

A. They are entered with red ink. One note, 12 months from date—supposed to be—\$200.00. One note, 24 months, \$225.00. This entry is made on December 13th, 1889.

Q. From the entry on that book are you able to tell when, or about when, these notes were given?

Mr. LOEB.—Same objection; and the additional objection that the notes themselves are the best evidence.

A. I am not able to state when they were given.

Q. Are you able to state about when they were given?

Mr. LOEB.—Same objection, and that the notes themselves are the best evidence.

A. From this book I should say December 13th, 1889, but I am not positive about that.

Q. Have you those notes now? A. No, sir.

Q. Do you know what became of them?

Mr. LOEB.—Same objection.

A. I think they were *return* to Mr. Trodick as they were paid.

Q. Were they paid at maturity or afterwards?

Mr. LOEB.—Same objection.

A. I can't say as to that.

Q. Who was the payee in those notes?

Mr. LOEB.—Same objection. A. I was.

(Testimony of George W. Houghton.)

Q. Did you acquire them in any representative capacity?

Mr. LOEB.—Same objection. And the notes themselves are the best evidence.

A. Let me understand that question.

Q. As agent for anybody else? A. No, sir.

Q. Who was the real owner of these notes?

A. I was.

Q. And of the debt represented thereby?

A. I was the owner.

Q. During the interval, whatever it was, between the time that you paid Molitor for this property and the time that the plaintiff, John Trodick, bought it of you, where were you living?

Mr. LOEB.—We object to the question for the further reason that the objection heretofore given to the entire line of testimony, for the reason that the witness has not testified that he purchased property from Molitor, but he testifies that Molitor was the means by which he came in contact with Mrs. *Lammlein*? A. At Wolf Creek.

Q. And at what particular spot or building in Wolf Creek?

A. In the depot; living-room—in the depot.

Q. Did you ever at any time live in the old *Lammlein* house? A. No, sir.

Q. Did you live anywhere else than in the railroad depot? A. No, sir.

Q. Where was Trodick working—what was he employed at when you first knew him—John Trodick, the plaintiff?

(Testimony of George W. Houghton.)

Mr. LOEB.—Same objection.

A. He was working on the section for the Montana Central railroad.

Q. Where was he working and what was he employed at when you sold him this property?

A. I am not able to answer that question.

Cross-examination by Mr. LOEB.

Q. Your memory isn't very clear, is it, Mr. Houghton, as to the exact facts that occurred some years back in '88 or '89?

A. Not very clear in this thing down here.

Q. And you have talked, have you, recently with Mr. McDonald?

A. Very slightly.

Q. With Mr. Forman?

A. Very little.

Q. Mr. Bullard?

A. Very little.

Q. Talked some with all of them as to the issues involved in this case?

A. Yes, sir.

Q. Now, as to this Molitor—did you buy the land of Molitor, or through Molitor—was he the means of bringing you in contact with Mrs. *Lammlein*?

A. Molitor was the means of bringing me in contact with Mrs. *Lammlein*, as he was doing her business for her.

Q. What business was Molitor in?

A. He was in the drug business.

Q. At Wolf Creek?

A. No, sir—St. Cloud, Minnesota.

Q. Did you ever talk with Mrs. *Lammlein* before she left Wolf Creek?

A. Yes.

Q. Talked with her about purchasing this place?

A. Yes.

(Testimony of George W. Houghton.)

Q. Did you have some understanding as to price from Mrs. *Lammleing* before she left Wolf Creek?

A. Yes.

Q. And what price did you understand with her that she was to turn over this *pace* to you for?

A. I don't remember.

Q. You think it was something less, do you, than the amount you sold to Trodick for?

A. Yes, sir.

Q. When you say that you don't remember as to the price that you had agreed on with Mrs. *Lammlein*, before she left Wolf Creek, do you know whether the price that you agreed on with Mrs. *Lammlein* before she left Wolf Creek was the price you afterward paid her?

A. If I remember right I paid cash right there, then and there.

Q. At Wolf Creek?

A. Yes, if I remember right.

Q. To Mrs. *Lammlein*?

A. To Mr. Molitor for Mrs. *Lammlein*.

Q. Was Molitor at Wolf Creek?

A. Yes, sir.

Q. With Mrs. *Lammlein*? A. Yes, sir.

Q. And did you talk the matter over with Molitor, yourself and Mrs. *Lammlein*? A. Yes, sir.

Q. How long after *Lammlein's* death was that?

A. I can't remember the particular dates, but it was a very short time.

Q. A few days? A. A few days; yes, sir.

(Testimony of George W. Houghton.)

Q. Molitor was some relative of Mrs. *Lammlein's*? A. Mrs. Molitor was.

Q. And he had come out there to help her settle up, had he, on account of Mr. *Lammlein's* death?

A. Yes, sir.

Q. And it was after *Lammlein's* death that you took up the matter about the *Lammlein* place there?

A. Yes, sir.

Q. With Molitor and Mrs. *Lammlein*?

A. Yes, sir.

Q. Molitor hadn't purchased the place from Mrs. *Lammlein*, had he, and sold it to you?

A. No, sir.

Q. Were there any papers drawn at that time?

A. Not that I remember of.

Q. Did you know Trodick before *Lammlein's* death? A. Oh, yes.

Q. Did you tell Trodick that he had better live on this land when you sold it to him, so that McDonald wouldn't claim it?

Mr. WALLACE.—Objected to as not cross-examination.

A. I don't remember if I did; whether I did or not.

Q. Well, what did you undertake to sell Trodick for \$500.00—all of the *Lammlein* place?

A. All that I had acquired.

Q. You purchased everything that Mrs. *Lammlein* had—her improvements and everything else?

A. Well, the improvements and the furniture.

(Testimony of George W. Houghton.)

Q. And whatever rights she had, or *Lammlein* had, to improvements, and furniture and the place, you undertook to transfer to Mr. Trodick?

A. Yes.

Q. How soon after you had closed your negotiations with Mrs. *Lammlein* at Wolf Creek, did you turn the place over to Trodick—did Trodick go to live in the *Lammlein* house? A. I can't say.

Q. It was a very short time, wasn't it?

A. I can't say; I should think so, though I can't say.

Q. Do you know of any one else who ever lived on the place after *Lammlein's* death and up to the time that Trodick went there to live?

A. There was no one living there between these two times that I know of.

Q. And the time you think was very short?

A. I think so.

Q. You don't know do you, Mr. Houghton, as to whether *Lammlein* undertook to sell to Trodick himself, before his death?

A. I don't know as to that.

Q. You would send Molitor at St. Cloud, Minnesota, remittances, would you, to be paid to Mrs. *Lammlein*, when there was anything due?

A. No.

Q. Did you write direct to Mrs. *Lammlein* at St. Cloud?

A. No, I don't think I ever wrote her there.

Q. Well, did you have any correspondence with Mrs. *Lammlein* or Molitor at St. Cloud, Minnesota?

(Testimony of George W. Houghton.)

A. Not that I remember of.

Q. Well, did you ever see Molitor after he left with Mrs. *Lammleingz*?

A. I don't remember of seeing him since that time.

Q. How long after *Lammlein's* death was it that Molitor and Mrs. *Lammlein* went to St. Cloud?

A. A few days only; I can't state exactly.

Q. Mrs. *Lammlein* was a very old woman, wasn't she?

A. Yes, sir.

Q. Older than *Lammlein*?

A. Yes, sir.

Q. How old a woman would you say Mrs. *Lammlein* was?

A. She was eighty-two when she left there.

Q. Do you know whether Trodick was working in the mill at Carterville, or at the section-house, about the time of *Lammlein's* death?

A. I can't say whether he was at the section-house or at the mill.

Q. Did McDonald ever try to buy this place?

A. I don't know.

Q. Did he ever tell you that he tried to buy the place?

A. No, he never did.

Q. In your book account, Mr. Houghton, there is a balance due to you, according to your book, from Trodick, to January 1st, 1891, \$196.72. I will ask you whether that has been paid?

A. Mr. Trodick has paid everything that he owes me, or that he ever owed me.

Q. So that he paid you in full—that is, he paid you for these improvements and that right down

(Testimony of George W. Houghton.)

there the sum of \$500.00, and the other amounts that are charged against him?

A. Yes, sir; he has paid everything.

Q. What you bought from Mrs. *Lammlein* and what you undertook to sell was the entire Wolf Creek bottom there that was included in the *Lammlein* occupancy?

A. That *Lammlein* was supposed to own at that time; he had sold some part of it.

Q. Sold a right of way to the railroad company?

A. Yes, sir.

Q. But eliminating the right of way to the railroad company, Mr. Houghton, you bought everything else in the bottom that *Lammlein* had?

A. Yes.

Q. And that included the creek bottom there practically from Wolf Creek on the west, did it, down to where the point of rocks comes in there east of the depot, some three hundred yards? And from bluff to bluff, north and south?

A. I don't know the lines there at all. I don't know where the east or the west line was, or the north or the south line. I know that the railroad company just took a right of way in there and paid. I don't know how much for the bottom, the better oart of the bottom.

Q. The railroad went right through the center of a grain field, did it?

A. I don't know anything about the grain field; I never saw it.

(Testimony of George W. Houghton.)

Q. The railroad was there when you came there?

A. Yes, sir.

Q. But whatever right Mrs. *Lammlein* had to the ground, eliminating what her hisband had sold to the railroad, you undertook the transfer to Trodick for this \$500.00?

A. I bought it and sold it; yes.

Q. You never went to live on the place, did you?

A. No, sir.

Q. Never laid any claim to *in* yourself in the land office—never sought to enter it as a homestead?

A. No, sir.

Q. Don't lay any claim to it now?

A. None whatever.

Q. Nor to the improvements on it?

A. No, sir.

Q. You are a citizen of the United States?

A. Yes, sir.

Q. Did you take Trodick over to the house and put him in possession after he bought from you?

A. Not that I know of.

Q. Well, in what form did this transfer take place?

A. I think it was between Mr. Trodick and I—just a verbal agreement at that time. I am not positive.

Q. Wasn't Mr. Trodick in the house when you sold him the house?

A. Do you mean to say, was he actually in the house at that time?

Q. Wasn't he living there at the time you finally concluded negotiations—You might have been talk-

(Testimony of George W. Houghton.)

ing about it before, but when you finally concluded your negotiations that he was to pay you five hundred dollars, wasn't he really in the house?

A. I don't remember.

Q. In fact, as to details, your memory is not very clear?

A. That is the idea exactly.

Q. You wouldn't undertake to say just exactly when Mr. Trodick went there, would you?

A. No, sir.

Q. And you wouldn't undertake to say whether you had talked to him about this place before *Lammlein's* death?

A. I don't know why I should have talked to him about it before his death, because I had no idea of getting it.

Q. At this time you cannot say whether you may have been negotiating for the purchase of the place with *Lammlein* prior to his death.

A. I am positive that I didn't negotiate with him prior to his death.

Q. But you are not so positive as to whether *Lammlein* had been negotiating with other people?

A. I don't know anything about that.

Q. Any way, your purchase was made for the purpose of selling it again. You didn't intend, did you, to prove up on the place yourself?

A. Oh, no.

Q. You were simply intending to get the place so as to turn the improvements and things over to some one else?

A. Yes, sir.

(Testimony of George W. Houghton.)

Q. You don't recollect, as I understand it, what was done when Trodick went into possession of the place—when you sold it?

A. I don't remember.

Q. Where did the transaction take place?

A. I don't remember whether it was inside of the depot, or outside of it, or where it was.

Q. It may have been in the *Lammlein* house?

A. I don't think it was.

Q. You don't remember, do you, Mr. Houghton?

A. No, I don't remember.

Q. You don't, at this time, recall who were present at these talks that you had with Trodick, leading up to the sale?

A. I don't remember of anybody.

Q. You don't remember whether there was one or more people present or whether any one was present?

A. I don't remember; no, sir.

Q. You don't even know just where the talks took place?

A. I do not.

Q. You are not positive either, are you, as to just exactly the form of remittance you made to Mrs. *Lammlein*—as to what amount of money you paid out?

A. Oh, no, I couldn't tell that.

Q. Nor you can't tell exactly as to how the money was paid; by this date you have forgotten that—as to whether it was paid direct to Mrs. *Lammlein*, or whether you handed it to Mr. Molitor to hand to Mrs. *Lammlein*?

A. I cannot say as to that.

(Testimony of George W. Houghton.)

Q. You didn't get any paper, did you, from any one evidencing these things?

A. I think I got a receipt from Mrs. *Lammlein* for the amount.

Q. Have you that receipt?

A. I don't think I have.

Q. Have you made an effort to find it?

A. Only through this book; I looked through that.

Q. Did you make any entry as to what was paid?

A. By me for the place?

Q. Yes. A. No.

Q. Does your book show an account with Mrs. *Lammlein*? A. No.

Redirect Examination by Mr. WALLACE.

Q. About how long before Mr. Molitor and Mrs. *Lammlein* left for St. Cloud, Minnesota, did you make the payment?

A. I couldn't say what the time was; I don't remember.

Q. And about what time did I understand you to say it was after *Lammlein's* death that they left for St. Cloud?

A. I can't say as to the exact time; a few days.

Q. Do you know the date *Lammlein* died?

A. No, sir.

Recross-examination by Mr. LOEB.

Q. You don't know the date of *Lammlein's* death? A. No, I don't.

Q. You don't know how many days after *Lammlein's* death you sold to Trodick A. Oh, no.

(Testimony of George W. Houghton.)

Q. That was probably a few days also, was it?

A. Yes, sir.

Redirect Examination by Mr. WALLACE.

Q. You have told us, I believe, that your best judgment was that it was about one month from the time that you bought from Molitor until you sold to Trodick?

A. I don't understand that that way; I don't know whether it was one month or one week.

Q. Do you remember of my asking you whether it was a year or ten years? A. Yes.

Q. And your finally saying it was about a month?

A. Something less than a month. Wasn't that about the way it was put?

Recross-examination by Mr. LOEB.

Q. You wouldn't undertake to say at this date, Mr. Houghton, that it was a month, would you? You simply have no recollection except it was a few days afterward?

A. I won't try to state the time because I don't know.

Q. And it may have been a few days, or a few more days? A. I wouldn't undertake to state.

Q. And you wouldn't undertake to state, Mr. Houghton, how many days elapsed after you arranged to purchase from Mrs. *Lammlein* to the date that you sold to Trodick—you wouldn't undertake to say? A. No, I don't know.

Q. And you wouldn't undertake to tell us the number of days that intervened from the date Mrs. *Lammlein* sold until Mrs. *Lammlein* left?

(Testimony of George W. Houghton.)

A. No.

Q. All took place in a short space of time, didn't it? A. Yes.

Q. And your recollection is that it might be a week, but you don't know? A. I don't know.

Q. But these two transactions took place very close together, did they?

A. As well as I remember. I can't state positively how long it was.

Q. In fact, it is hard to say at this date whether any time intervened between these transactions?

A. The dates have all escaped me.

Redirect Examination by Mr. WALLACE.

Q. Are you able to tell us about the length of time that intervened between the time that Molitor and Mrs. *Lammlein* left for St. Cloud, and the time that you sold to Trodick?

A. I am not able to state the time; no, sir.

Recross-examination by Mr. LOEB.

Q. You couldn't say that Mrs. *Lammlein* had left for St. Cloud, positively, when you sold to Trodick? You are not positive about that at this date, are you, Mr. Houghton?

A. I can't answer the question. I have forgotten.

That is all.

GEORGE W. HOUGHTON.

Subscribed and sworn to before me this 1st day of Febrary, 1905.

A. K. BARBOUR,
Special Examiner.

Defendants' Exhibit "A-4."

Dr.	JOHN TRODICK.	183
1889		Cr.
Aug. 28. To Ranch	\$500.00	Aug. 29. By half day work....\$.80
— To Furniture, etc.....	60.00	— 31. By day work..... 1.60
Sep. 4. To Cash Billy Morris.	1.00	Aug. 28. By Cash..... 30.00
4. To 50# flour.....	2.25	Sept. 2. By Cash..... 4.00
8. To 5# sugar.....	.50	Sept. 2. By day work..... 1.00
Oct. 15. To wheat \$2.55 sug. 1.00	3.55	Sept. 3. By — 1.60
15. To tea 50¢ Coff 80.....	1.30	Sept. 4. By — 1.60
15. To 100 flour 2.50 fw 25	2.75	Sept. 5. By — 1.00
15. To 1 GaL syrup.....	1.00	Sept. 5. By check..... 10.00
15. To 1 pkg Groats.....	.15	Sep. 26. By Cash..... 20.00
22. To 1 pk Groats.....	.15	Sep. 29. By " Exp..... 5.60
	.85	Oct. 15. By work..... .75
28. To Inst on 70.00 @10%		Oct. 21. By cash N. P. Ry.... 18.60
note 60 da.....	1.16	Oct. 22. By cash..... 30.00
Nov. 13. To Ticket Charlie.....	25.00	Nov. 13. By Cash Teller..... 10.00
17. To 18 Beef.....	1.62	— — By check..... 16.80
17. To Bacon.....	1.50	
17. To Syrup 90 OMeal 15	1.05	
25. To Chix 6.50 OMeal 15		
To Peaches 25.....	6.90	
	610.11	page 27 153 95

page 27 153.95

TRODICK, JOHN.

27

1889		
Dr Bal.....	610.11	
Nov. 27. To pkg OMeal.....	.15	Ex. Bal..... 153.95
— Hf Brl apples.....	2.75	
Cups & Saucers 70		
Plates 70.....	1.40	
— Veg dishes 50		
spoons 15.....	.65	
Lard	1.80	
2. Pa R Oats.....	.15	
Dec. 1. Bkg Powd.....	.35	

Dec 13—1889		Dec. 13—1889.	
Debit Bal.....	618.00	Credit Bal.....	153.95
Dec. 14. Can peaches.....	.25	1 note 12 mo.....	200.00
— 24. 5¼ OMeal.....	.35	1 note 24 mo.....	225.00
24. 2 Bale Hay 2.30.....	2.30	Dec. 13. By Check.....	29.80
25. Slate Book etc.....	1.25	Jan. 1. By cash Williams.....	3.40
Dec. 30. 2 Bales hay.....	2.30	2. By " self.....	3.00
Jan. 6. Roll Oats.....	1.25	Jan. 22. By Cash.....	11.00
6. Sugar 50 Beans 75....	1.25	Feb. 23. By ".....	12.00
Jan. 22. #/100 Flour.....	3.25	Apr. 23. By Ticket to Helena..	35
— 1½ Bale hay.....	3.85	— 23. By Cash.....	40.00
24. 1 can syrup.....	.90	May 3. By ".....	12.00
26. 1 Gal Oil.....	.40	May 3. By ".....	62.00
Jan. 28. Whea ^t	2.00	Oct. 15. By ".....	30.00
Feb. 1. Hay.....	2.00	Nov. 27. By ".....	30.00
Mch. 1. ".....	3.00	— 15. By Potatoes	
Mch. 18. Cash.....	6.00	600 lbs.....	9.00
Apr. 4. R Oats 1.15 Bacon 2.30		Jan. 26. By Cash.....	20.00
frt 25.....	3.70	June 7, 1895 — 3 Bot beer.....	.75
Apr. 9. C Com 1.75 meal 75			
frt 50.....	3.00		
Apr. 23. To Ticket Charley.....	.95		
May 6. 7 sx potatoes.....	15.79		
— frt on same.....	1.75	1890.	
10. Rake, Hoe & can & exp	3.65	Jan. 1. due from Trodick.....	196.72
June 20. Ckd Com 2.00 frt 25..	2.25		
Jun 28.			
	680.44		690.

W. R. RALSTON, a witness called by complainant, in rebuttal, testified as follows:

Direct Examination by Mr. LOEB.

Q. Mr. Ralston, what is your fuuull name?

A. William R. Ralston.

Q. What is your age? A. Forty-six.

Q. How long have you lived in the State of Montana? A. Since '64.

Q. You came to Montana as a boy?

A. Yes, sir.

Q. Went to school here? A. Yes, sir.

Q. Where did you first live on coming to Montana. A. Alder Gulch.

Q. Then where did you live?

A. Nelson Gulch.

Q. Then where did you live?

A. From Nelson Gulch went to Trinity Gulch, in the Little Prickly Pear Valley.

Q. Trinity Gulch is at the head of Little Prickly Pear Valley?

A. No, sir, not at the head of the valley, about half-way along the valley.

Q. It is in Lewis & Clark County, is it?

A. Yes, sir.

Q. How long did you live in the vicinity of Trinity Gulch? A. I lived there from '67 to '78.

Q. Did you know Martin *Lammlein*?

A. Yes, sir.

Q. When did you first know Martin *Lammlein*?

A. '67.

(Testimony of W. R. Ralston.)

Q. Where did you know him then?

A. In Silver City.

Q. Do you know where *Lammlein* afterwards moved to on the little Prickly Pear Creek?

A. Yes, sir.

Q. When did you first know him down at Wolf Creek on the little Prickly Pear Creek?

A. Just below Wolf Creek in '75.

Q. How long after 1875 did you know Martin *Lammlein*, when he was residing on the Little Prickly Pear at the point known as Wolf Creek?

A. I knew him until his death.

Q. How frequently did you go by his place or stop there between the years 1875 and *Lammlein's* death?

A. Well, during the summers of 1875 until 1878, I was up and down the road—well, as much as twice a month and some months oftener; but after '78 I was up only two or three times a year during a year, but I nearly always stopped there; I always stopped there if any one was at home.

Q. What business were you engaged in in those years from '75 to '88?

A. I was buying cattle for the butchers here in Helena and in the butcher business.

Q. And did you make many trips down through the canyon and through Wolf Creek and by Mr. *Lammlein's* place?

A. Yes, sir.

Q. How often did you go by?

A. Twice a month and oftener some months; and I have gone perhaps as many as half a dozen times during a month.

(Testimony of W. R. Ralston.)

Q. Did you know *Lammlein* intimately? You say you stopped there?

A. Yes, very frequently I would stop there on the down trip, going down, having nothing but my saddle horse, and no one with me, but coming back I would nearly always have cattle and I would stop with Mr. Kisselpaugh, or at Rock Creek, because I required a corral, and I would stay there with my cattle.

Q. Do you know where the present railroad track is at Wolf Creek? A. Yes, sir.

Q. Do you know where the present county road is there at Wolf Creek?

A. No, I don't know that.

Q. Did you know the old county road?

A. Yes, I knew the old county road.

Q. Do you know the bridge across the creek at Wolf Creek? A. At Wolf Creek; yes, sir.

Q. I am showing you exhibit 1 in the testimony of Paul S. A. Bickel. Do you notice the mark bridge across the creek? A. Yes, sir.

Q. I will ask you if that is substantially correct as you know it?

A. I should judge so; of course that would be pretty hard to say from that map.

Q. But as the bridge is on the ground, that appears to you to be substantially correct?

A. Yes, sir.

Q. And when you first knew *Lammlein* and during these years from '75 on, how much did *Lammlein* have down there?

(Testimony of W. R. Ralston.)

A. Well, I couldn't say. He claimed from Mr. Kisselpaugh's land, which ran just a short distance below the mouth of Wolf Creek; he claimed down to the point that jutted into the river there, the creek at that point was rip-rapped, to prevent it cutting out the county road; he claimed both sides of the road and he claimed the entire bottom where Wolf Creek is now, and had it fenced in an imperfect way, three log poles and a leaning pole in some places and in some other places brush fences; up and down the road he had all poles.

Q. Well, from Kisselpaugh's east, how far was it that you say he claimed—what would you estimate?

A. Well, I couldn't say; several hundred yards.

Q. A quarter of a mile?

A. Yes, more than that by the road, for the road was winding; straight across I could not say because that bottom was all willows; heavily covered with willows.

Q. It was over a quarter of a mile, east and west?

A. Oh, yes.

Q. And from north to south *Lammlein's* land claim included all the land, did it, from bluff to bluff?

A. Yes, sir, included all the land from the face of the bluff on the south side. The river ran there right to the face of the bluff, and he claimed land from the river to the rocks, which was pretty well up on the bluff on the north side, because he had a pasture up there and he used it for quite a while.

Q. North of his house?

A. Yes, north of the county road.

(Testimony of W. R. Ralston.)

Q. Did you have occasion sometimes to use his pasture for your horse?

A. Yes, when I passed through in the summer time I would use the pasture, and in the winter time I would stop and put my horse in the stable. I used the pasture several times.

Q. In 1891 or 1892 there was a flood in this country, down the Little Pirkely Pear canyon, wasn't there? A. Yes, sir.

Q. When after that did you first go to Wolf Creek?

A. Why, just shortly after the flood. I went up on the train then, though, and they stopped the train I was on at Wolf Creek, stopped some little time.

Q. Had the new track just been completed?

A. Yes, sir, the new track.

Q. You were on one of the first trains that went through after the flood?

A. Among the first trains.

Q. How long did you stop at Wolf Creek?

A. An hour or thereabouts.

Q. Did you get off the train there?

A. Yes, sir.

Q. To look around? A. Yes, sir.

Q. And stayed there, you think, about an hour?

A. Yes.

Q. Now, as the track was then located after the flood—did you notice the location of the track?

A. Yes, sir.

(Testimony of W. R. Ralston.)

Q. How many acres would you say, Mr. Ralston, was included in *Lammlein's* occupancy, north of the railroad track as it was located after the flood?

A. Would that include the bench land, all of it?

Q. Yes, the pasture and all that *Lammlein* claimed.

A. About 100 acres—in that neighborhood.

Q. And when I say north of the railroad track, you understand me to mean the railroad track as it now exists? A. Certainly.

Q. And this 100 acre tract that *Lammlein* claimed was included between the bluffs on the north of the railroad and the railroad track, and Wolf Creek on the west, and this point about a quarter of a mile east, where the creek was ripped, on the east?

A. Yes, sir.

Q. Was *Lammlein* an industrious sort of a man? Did he clear much brush?

A. Yes; for an old man he did quite a lot of work there.

Q. Seemed to be a hard worker—always at work on his place? A. Yes, sir.

Mr. BULLARD.—Objected to as incompetent, irrelevant and immaterial.

Q. What kind of a place did he have there, as compared with the place you finally saw before his death. Had it improved some? A. Certainly.

Q. Had there been much work done by *Lammlein*?

Mr. BULLARD.—Objected to as incompetent, irrelevant and immaterial.

(Testimony of W. R. Ralston.)

A. Yes, sir, he had cleared out quite a lot of brush along the roadside.

Q. Did he have anything north of his house in the way of an enclosure there—a pasture?

Mr. BULLARD.—Objected to as leading.

A. Yes, sir; he had a little garden; there was a spring coming out there and he had a little garden up there.

Q. What now recalls to you the existence of that garden—anything in particular?

A. Well, I don't know that there was anything in particular to recall it.

Q. Was there any particular class of farming products that serves to recall to you the existence of that garden; any growth there?

A. Well, nothing except he had some fruit trees there; he had a few fruit trees.

Q. And this was how many feet lineally, would you say, north of his house?

A. Four or five hundred feet.

Mr. BULLARD.—No cross-examination.

W. R. RALSTON.

Subscribed and sworn to before me this 18 day of January, 1905.

ASHBURN K. BARBOUR,

Special Examiner.

The EXAMINER.—The hearing will now adjourn, by agreement of counsel, until Wednesday morning, January 18th, at ten o'clock A. M.

January 31st, 1905—hearing by agreement continued until February 10th, 1905.

February 10th, 1905—hearing by agreement continued until February 15th, 1905.

February 15th, 1905—hearing resumed.

Mr. WALLACE.—Defendant's Exhibit A-5 marked, by the Special Examiner, is offered and received in evidence without objection, being certified copy of notice of location of mining claim of Albion McDonald.

It is also hereby stipulated between the complainant and defendants that the whole of section 35, township 15 north of range 4 west was classified, under the provisions of the mineral land classification act of Congress of the United States as non-mineral land in April, 1897, and that after due publication of the classification, in accordance with the provisions of that act, such classification was approved July 31st, 1897, by the Commissioner of the General Land office, or the Secretary of the Interior, in accordance with the Commissioner's letter N of August 25th, 1897, local U. S. Land Office No. 8198, and that there was no protest of any kind filed or had against the classification of this section.

Mr. LOEB.—All right.

F. L. REECE, a witness called on behalf of defendant, sworn, testified as follows:

Direct Examination by Mr. WALLACE.

Q. You testified before in this cause, didn't you?

A. I did.

Q. Do you know Albion McDonald, the defendant in this case?

A. I do.

Q. You know the subject matter of this action?

A. I do, sir.

Q. Do you recall an occasion when, with reference to the land here involved, Albion McDonald made you a payment of a certain sum of money?

A. I do.

Q. What was the amount?

A. Fifteen dollars.

Q. Who was present at the time the payment was made?

A. No one at all, sir, except McDonald.

Q. Was the plaintiff John Trodick there?

A. No, sir; not at that time.

Q. Had he been there with McDonald before?

A. He was there before or subsequent to that time.

Q. Once or more than once?

A. I think in my office several times together, but subsequent to the time of the payment.

Q. What was this payment made you for?

A. On account of services that I was to perform in preparing a protest against the selection of the Northern Pacific Railway Company.

Q. And who was the person interested in that protest?

(Testimony of F. L. Reece.)

A. Mr. Trodick. He was the plaintiff or protestant.

Q. And when you refer to the protest, do you refer to the contest proceedings that were begun?

A. I do, sir.

Q. And when with reference to the time of the initiation of that contest had this occurred—the payment of this money and their coming to your office?

A. Shortly afterwards.

Q. That is, shortly after the initiation of the contest?

A. Yes, sir.

Cross-examination by Mr. LOEB.

Q. Had Trodick been to your office before that time?

A. Yes, sir, he had.

Q. Who brought him there originally—the first time?

A. Mr. Paul Bickel.

Q. And when Mr. Bickel brought him there—it was then that you were employed to look after this contest?

A. Shortly after that, sir.

Q. Who employed you?

A. Mr. Trodick.

Q. He came alone that time, did he?

A. I think his son Charlie was with him, but I am not positive as to that time.

Q. But this was before McDonald gave you the ten dollars?

A. It was fifteen dollars; I didn't say ten dollars.

Q. The fifteen dollars?

A. Yes, sir.

Q. So that the plaintiff John Trodick had been to your office in company with Paul Bickel on one occasion and alone himself on a second occasion, at

(Testimony of F. L. Reece.)

which time you were employed by him—before McDonald handed you the fifteen dollars?

A. Yes, sir.

Q. And Mr. Trodick was not with McDonald when he handed you the fifteen dollars?

A. No, he was not.

Q. Mr. Reece, when you were employed in this matter by Mr. Trodick, Mr. McDonald was not present, was he?

A. No, sir; I am positive he was not.

Q. And what have you to say as to whether McDonald brought Trodick to you, or whether Trodick had been to you before and employed you before McDonald handed you the fifteen dollars?

A. I believe I have already explained that. He employed me shortly after Bickell brought him there to my office; we went downstairs together and examined the plat that had been filed shortly before the land was thrown open for entry, and the Northern Pacific selection was made at the same time the land was so opened and consequently Mr. *Trodick's* homestead application had to be denied, and then the contest proceedings were commenced.

Q. And this was all done before McDonald handed you the fifteen dollars?

A. That is the application and the contest proceedings; yes, sir.

Redirect Examination by Mr. WALLACE.

Q. You did some service in the matter, however, afterward? A. Oh, yes.

(Testimony of F. L. Reece.)

Q. When I say afterwards, I mean after you were paid the \$15.00. A. Yes, sir.

Recross-examination by Mr. LOEB.

Q. Were you ever paid any more money than fifteen dollars? A. I was.

Q. By whom?

A. Trodick. He paid me five or ten dollars. I took the case on a contingent fee; upon the event of being successful I was to receive so much money, otherwise I was not to receive any money.

Q. And Mr. Trodick paid you some money afterward?

A. Yes, for taking testimony in the U. S. Land office, and such things as that.

Q. You say you had the case on a contingent fee? A. I had.

Q. And the money, then, that McDonald paid you was not a part of your fee then—it was to be used in expenses, was it?

A. Oh, no; no, sir. That was really a retainer in the case, for preparing the homestead application. And the contest papers.

Q. Trodick had employed you to prepare this application, however, before McDonald brought in this money? A. Yes, sir, that is the fact.

That is all.

FRANK L. REECE.

Subscribed and sworn to before me this 16th day of February, 1905.

A. K. BARBOUR,
Special Examiner.

W. R. RALSTON, a witness called on behalf of defendant, testified as follows :

Direct Examination by Mr. WALLACE.

Q. You have already testified here in the case, Mr. Ralston? A. Yes, sir.

Q. Speaking of the *Lammein* improvements, can you tell us how many acres *Lammein* had under cultivation? A. No, not exactly.

Q. Approximately?

A. He had something like from seven to ten acres.

Q. Your acquaintaⁱn^ce with this land was when, with reference to the time of the coming of the railroad—before or after? A. Before.

Q. Did you know old man Kisselpaugh and Carter there? A. Yes, sir—well.

Q. Do you know what, it any, portion of the bottom land, down-stream from Wolf Creek, old man Kisselpaugh laid claim to before the coming of the railroad?

A. All I know *if* that is that he claimed a neck of land next to Wolf Creek; and they were trying to claim their land about where the section lines would cross—where they thought they would cross; in fact, I think there was a section surveyed near there somewhere; and he claimed that this land would run somewhere below Wolf Creek. I know very little about it—I simply heard them speak of it.

Q. This neck of land you speak of embraced about how many acres? Do you know?

A. No, not exactly—what they claimed, I couldn't say.

(Testimony of W. R. Ralston.)

Q. It was, however, in the Prickly Pear bottom?

A. Yes, sir.

Q. Between it and Wolf Creek?

A. Yes, sir.

Cross-examination by Mr. LOEB.

Q. Between what and Wolf Creek was this Kisselpaugh land?

A. You might say it was between the foothill and Prickly Pear, lying next to Wolf Creek.

Q. You don't mean by that answer Mr. Ralston to in any way modify or change the testimony you gave the other day?

Mr. WALLACE.—Objected to as improper cross-examination and calling for a construction by the witness of his own testimony. A. No, sir.

Q. When you said that the *Lammlein* claim occupied all the land between Wolf Creek on the west to the rip-rap on the east and from bluff to bluff, north and south.

A. Yes, sir; that is what Mr. *Lammlein* claimed.

Q. And the Kisselpaugh land—that was then west of the *Lammlein* land? A. Yes, sir.

Q. How far east of the mouth of Wolf Creek did the Kisselpaugh land extend?

A. East? That would be down creek?

Q. Yes.

A. Oh, it was a very short distance—just a small neck of land. I don't think they had any trouble about it at all; but Mr. Kisselpaugh claimed he had a portion of the land in that little field that *Lammlein* had fenced. In fact, I don't know that I ever heard

(Testimony of W. R. Ralston.)

Kisselpaugh say anything about it, but I heard Mr. *Lammlein* say that Kisselpaugh claimed a portion of that neck.

Q. Do you know how much he claimed?

A. No, I do not.

Q. Do you know whether since then Kisselpaugh has acquired a title to the land he claims?

A. No, I don't.

Q. You have not seen the land there recently?

A. No, sir.

Q. Did this neck of land that Kisselpaugh claimed extend anywhere near to where the present townsite of Wolf Creek is?

A. No, sir.

Q. How many feet west of that?

A. Oh, I couldn't say—it was several hundred feet.

Q. So that it was more than several hundred feet west of the present townsite of Wolf Creek?

A. Yes, sir.

Q. That Kisselpaugh laid any claim at all to the land in that bottom?

A. Yes, sir.

Q. And all you know of Kisselpaugh claiming the land is what *Lammlein* said—what you heard *Lammlein* say that Kisselpaugh claimed a little neck of land in there?

A. Yes, sir; that is all I know about it.

Q. And whatever land Mr. Kisselpaugh did claim there was occupied either by him or *Lammlein*?

A. Well, *Lammlein* had it fenced at that time.

Q. *Lammlein* had it fenced?

(Testimony of W. R. Ralston.)

A. Yes—and Kisselpaugh had nothing on it at that time.

Q. But *Lammlein* had the land fenced?

A. Wolf Creek there is the line between *Lammlein* and Kisselpaugh, at the time I mentioned.

Q. The east and west line?

A. Yes, sir.

Q. And *Lammlein* had the land fenced west of Wolf Creek?

A. In a way, he had it fenced east of Wolf Creek; he had brush out down and interlaced, to keep stock out on the old county road.

Q. And this was in a casual conversation that *Lammlein* told you that Kisselpaugh claimed some of that land adjacent to Wolf Creek?

A. I don't remember just how he come to tell me, but I remember distinctly about his speaking of it.

Q. What would you say the value of the *Lammlein* or Trodick land is, assuming that Trodick purchased the *Lammlein* land, now.

Mr. WALLACE.—We object to this question, first, as not cross-examination.

A. Well, you mean by that, that whole bottom as Mr. *Lammlein* claimed the land?

Q. Yes—eliminating what the railroad has taken out.

Mr. WALLACE.—You can add to that objection that no qualification has been laid and that it appears affirmatively that the witness has no acquaintance with the land since 1887 when the railroad came.

(Testimony of W. R. Ralston.)

A. Of course, that is a pretty hard question. The way ranches are sold in that section of the country, the land with improvements, without any question as to the *tile*, would be worth a couple of thousand dollars.

Redirect Examination by Mr. WALLACE.

Q. And exclusive of the improvements would be worth how much?

A. Well, what do you mean by the improvements?

Q. Whatever you mean by them.

A. Well, I suppose exclusive of the improvements it wouldn't be worth so much; a ranch without the ranch improvements is only worth the bare land.

Q. When you said that this neck of land between Wolf Creek and Prickly Pear lay to the west of the townsite of Wolf Creek, did you mean west of the boundaries of the townsite as platted by Auchard, or the buildings?

A. Only the buildings; I don't know anything about the boundaries of the townsite.

That is all.

Mr. LOEB.—We would now like to recall Mr. Ralston as our witness, as a part of plaintiff's case in rebuttal, if you have closed.

Mr. WALLACE.—Very well.

W. R. RALSTON, recalled as complainant's witness in rebuttal, testified, as follows:

Direct Examination by Mr. LOEB.

Q. Mr. Ralston, have you had some experience with the sale of land in the vicinity of Wolf Creek?

(Testimony of W. R. Ralston.)

Mr. WALLACE.—Do you mean this as a part of the plaintiff's case in chief?

Mr. LOEB.—I mean a part of our case in rebuttal. On account of your objection I am going to make him one of our witnesses.

Q. You have had some experience in seeing ranches bought and sold in the vicinity of Wolf Creek?

A. Not in the immediate vicinity of Wolf Creek, but down in the country there along the Missouri River.

Q. And you know something of the value of ranches for farming purposes?

A. Yes, sir—I think I do.

Q. You of course have testified that you know *Lammlein* place and the Trodick place, which is the same as the *Lammlein* place? A. Yes.

Q. I will get you to say again what you would say the value of the Trodick place would be, eliminating from your consideration its value for townsite purposes—just as a ranch.

Mr. WALLACE.—We object, first, on the ground that no sufficient foundation is laid; second, that this is not rebutting testimony, but is a part of the plaintiff's case in chief; and it is immaterial in point of period.

Mr. LOEB.—You say add to that question: "On or about March 15th, 1904."

A. That is a year ago?

Q. Yes. What would be its value as a ranch, eliminating from your consideration the fact of the im-

(Testimony of W. R. Ralston.)

provements—the townsite improvements there—that is, the fact of its value by proximity to Wolf Creek.

A. That is what I mean; I don't know anything about the townsite values. I have never been there and I don't know anything about the town at all.

Q. When you say, Mr. Ralston, that that is what you meant, you mean, do you, that the Trodick ranch there would be worth about two thousand dollars on March 15th, 1904, without any regard to the fact that there is at present a townsite springing up near Wolf Creek?

Mr. WALLACE.—Objected to as leading and not rebuttal.

A. Certainly; that is what I mean.

Q. I will get you to state whether in giving your estimate you took into consideration at all the fact that there was a townsite springing up in that vicinity?

Mr. WALLACE.—Objected to as not rebuttal.

A. Well, I say I don't know anything about the townsite. I haven't been there since the town of Wolf Creek—except in passing but once.

Q. Your testimony, then, is based entirely upon the consideration of the value of this land for farming purposes?

Mr. WALLACE.—Objected to as leading and not rebuttal.

A. Well, I wouldn't say for farming purposes, because the value of the *Lammlein* place rested largely with what it controlled; it controls consider-

(Testimony of W. R. Ralston.)

able range and considerable country on both sides of the Prickly Pear.

Q. For farming and stock-raising purposes?

Mr. WALLACE.—Same objection—leading and not rebuttal. A. Yes, sir.

Q. And you give us, do you, this estimate of the value of the land for farming and stock-raising purposes, as an estimate made by you considering the value of other lands for the same purposes in and near that vicinity?

Mr. WALLACE.—Objected to as leading and not rebuttal. A. Yes, sir.

Q. You haven't seen the *Lammlein* place since the section of the town hall on it, have you?

A. I don't know; I have been up and down the railroad several times, but I don't know whether there was a town hall there or not; I never stopped at Wolf Creek.

Q. In estimating the value of the place, you didn't take into consideration the fact that on that place had been erected a town hall?

Mr. WALLACE.—Objected to as leading and not rebuttal. A. No, sir.

Q. You eliminated that entirely from the consideration?

Mr. WALLACE.—Objected to as leading and not rebuttal. A. Yes, sir.

Q. I will get you to state, then, whether it was strictly the value of the place for ranch and stock-raising purposes that you considered in giving us the

(Testimony of W. R. Ralston.)

estimate of the value of the place, or whether you took into consideration anything else.

Mr. WALLACE.—Objected to as not rebuttal.

A. I think I answered that question before.

Q. What did you say? A. Yes, sir.

No cross-examination.

That is all.

W. R. RALSTON.

Subscribed and sworn to before me this 16th day of February, A. D. 1905.

A. K. BARBOUR,
Special Examiner.

JOHN TRODICK, plaintiff, recalled in rebuttal, testified as follows:

Direct Examination by Mr. LOEB.

Q. Mr. Trodick, I am showing you a receipt which Mr. Auchard gave to you for some money that you paid to him, and which you produced in response to a request by counsel for the defendants. Will you tell us how it was that you happened to pay^b any money to get this receipt?

A. Yes, sir, I will tell you. Mr. Auchard come there and he sent a notice to me about it by Balliett, the lawyer, to either buy the land or quit the place; finally, I didn't take no notice and he come there himself in the saloon—I only was there myself and he come and says, "What are you going to do?" and I says, "What I am going to do? I am going to stay where I am." He says, "You will have to buy the

(Testimony of John Trodick.)

land or move." And I said, "Look here, Mr. Auchard. The land is not yours no more than it is mine—the land is in dispute, and I don't want to have no trouble over it at all until it is decided by law." "Yes," he says, "but I have got a right to the land; I have got a title." I says, "Look here; before I get into any trouble I will give you fifty dollars"—he wanted \$100.00 for the whole flat. "No," I says, "I will pay you for the land where my saloon stands on until the case is decided." "Well," he says, "it is all right; and I counted the fifty dollars on the bar: of course I can't read nor write, and there was nobody in the saloon only me and him. He give me a receipt for fifty dollars for that place; and I said, "I don't want no trouble until the case is decided"; and I gave him fifty dollars for the land my saloon stands on for the use of the land, until the case is decided.

Q. Then, Mr. Trodick, your paying the fifty dollars to Mr. Auchard was done with a view to a compromise and satisfaction until you could determine who owned the land?

Mr. BULLARD.—Objected to as leading and incompetent.

A. Yes, until it was decided. I told him the land I had as much right to it as he had; and I told him the land is in the law now and I don't want to buy no land nor nothing at all until I found out how it was decided; because the land was in the case there

(Testimony of John Trodick.)

and I never agreed to do anything; I didn't want a fight.

Q. You wanted to be in peace, did you, during the litigation? A. Yes, I didn't want no fight.

Q. That is, you didn't want to fight *furing* the time this litigation was going on?

A. No, sir—the law would decide it.

Q. You didn't buy the land of him as if you were buying a lot to live on?

Mr. BULLARD.—Objected to as improper examination and incompetent.

A. I said I wouldn't buy from him; but I told him I will give you fifty dollars for the land my saloon stands on to have no trouble or quarrel, until the case is decided. I didn't say I *buyt* it nor nothing else; I says I will give you fifty dollars for the thirty feet my saloon stands on.

Q. Now, you heard the testimony of Mr. McDonald, did you, that you were a section-hand in '89, when you moved on to the *Lammlein* place?

A. Yes, sir.

Q. What was your business prior to being a section-hand?

A. Well, sir, my business is when I was younger, a machinist and engineer—stationary engineer—when I was younger.

Q. And you were employed on the section at Wolf Creek when your attention was called to this land?

A. Yes—I wasn't very particular how I worked so long as there was an honest dollar to be earned.

(Testimony of John Trodick.)

Q. You are eighty-four years old, are you?

A. Yes, sir.

Q. Did you have a talk with Mr. Forman when he was building? A. Yes, sir, I did.

Q. And what was that?

A. I told him Sunday morning about ten o'clock, between nine and ten o'clock, I couldn't exactly tell within a half an hour—in my front yard there we were talking and I said to Mr. Forman—he was building an addition to his house, I said “Charlie, if I was you I wouldn't build; I forbid you to build it.” He says, “Why?” I say, “Because you know the case is in the law, and it is neither the one way nor the other, and I can't give you my permission to build it.” “Well,” he says, “John, if you win the case,” he said, “Mr. Auchard will pay for all the claims”—of course that is the only satisfaction I got.

Q. That is, Forman told you he was going to build anyway, over your protest?

A. Yes; he says, “I am going to build it, and if you win, Mr. Auchard will pay all the expenses.”

Q. No, have you erected any improvements on the *Lammlein* place since you bought it?

A. Yes, sir.

Q. What did you put on there?

A. Well, I put on, in the first place, a two-room house and a clothes closet and a pantry; it is now a six-room house; a six-room house with the front part of it sawed logs, in the front part, and the rest is all stone building.

(Testimony of John Trodick.)

Q. Now, you say you have erected some improvements on and around the house. Did you put up a saloon building?

A. A saloon building? Yes, I put up a saloon building.

Q. How much was that worth?

A. That was worth \$820.00—I figured it up the other day; besides the saloon it has an upstairs.

Mr. BULLARD.—This entire line of testimony is objected to as being improper rebuttal.

Q. What was the value of this addition to your house?

Mr. BULLARD.—Same objection.

A. The value of my house—\$150.00.

Q. What *othe* buildings did you put up there? Did you put up a public hall?

Mr. BULLARD.—Same objection.

A. Yes, I put up a public hall; that would be worth \$550.00.

Q. You spent all of that on there yourself—of that \$550.00? A. Sir?

Q. Did you put \$550.00 into that public hall?

Mr. BULLARD.—Same objection.

A. Yes, sir.

Q. Did you ever put anything in the way of trees on that place?

A. Yes; I have an orchard of trees.

Mr. BULLARD.—Objected to as not rebuttal.

Q. A fruit orchard? A. Yes.

Q. And how much was that worth?

(Testimony of John Trodick.)

Mr. BULLARD.—It is understood that all testimony with reference to improvements placed on the property by Trodick at this time is objected to as immaterial and not rebuttal.

Mr. LOEB.—All right.

A. The plants—I have 28 trees now bearing fruit; they are bearing fruit every year, pears, *pulms* and prunes; they are bearing every year.

Q. And how much would they be worth?

A. They cost me three dollars a plant—the plants when I bought them, and I have them now about 5 or 6 years.

Q. How much altogether would you say they were worth?

A. The garden behind the saloon was about half an acre there and I plows it every year, and the fruit trees and everything that is there behind the saloon—everything that is there, and the saloon building, I wouldn't take nine hundred dollars for that place; then, besides, my garden is there, where you can see it there in front of my house, and there is 18 trees there, apples and pears and plums.

Q. How much did you expend for fruit trees?

A. I paid three dollars for each tree—for each plant.

Q. How many trees are there?

A. Twenty-eight in one garden and 18 in the other; that is without the ground.

Q. You paid three dollars each?

A. Yes, sir.

(Testimony of John Trodick.)

Q. Did you build a smokehouse there?

A. There is a smokehouse built there by Mr. *Lammlein*; the cellar is twenty feet long and twelve feet wide, all stone cellar; he was a mason himself; and I built a workroom and a work bench in there; in one end is the smokehouse in the cellar and the workroom in the other; all stone. Then in my house there is a big cellar, twenty feet long and ten feet wide; I measured it myself before I came and it is all stone built and he built it himself; and the house is a six-room house and there is only the front part where it is sawed logs, and the rest is bedroom and a dining-room and a part of the parlor—it is all stone building.

Q. In fact, Mr. Trodick, what have you done with the money that you have been able to earn since you went to this place?

A. Every penny I have made since 1890, when I go there on the ground I have put on that ground—every penny of it. I rebuilt that ground after the washout was washed it away. It was washed away from under Mr. Forman's house and where Mr. McSonald's saloon and my saloon was, it was down there and I got a team and a scraper for two months and scraped around in there and right in front of my house; all the ground and all the trees were washed away.

Q. So every dollar you have earned since 1890 has gone in that ground you bought?

(Testimony of John Trodick.)

A. Every penny of it, except what I kept to keep myself, and I built that breakwater on the west side of my house where it is rip-rapped there; it cost me \$120.00 and the county built the rest; and I paid \$120.00 for the rip-rapping there.

Q. Now, did you ever own any cattle?

A. Cattle?

Q. Yes.

A. Well, I had always from 25 to 30 head cattle.

Q. You used this place to raise them on?

A. I couldn't do so no more; the reason why I couldn't was because I got no hay in the winter; and I have my brand to show in the Recorder's office here, 9—(Bar) y; and I have four head of horses right on the ranch now.

Q. 9-Y is your brand; and is it a recorded brand?

A. Yes, sir, it is recorded; the brand of John Trodick and son; my son was only a kid and I put his name there so if anything happened to me in my old age he would have no trouble to claim the property.

Q. Now, did you ever have any wagons?

A. I had wagons, plows, and rakes and a hayrack.

Q. Did you ever have any plows, you say?

A. Yes.

Mr. BULLARD.—All of this testimony goes in over the objection of the defendants on the ground that it is not proper rebuttal.

Q. You say you had plows?

(Testimony of John Trodick.)

A. I had a plow and every year I plow—every spring, that place back of my saloon, I plows it regular.

Q. With your own plow?

A. Of course I don't keep it there; Mr. Reinig, he plows with the same plow.

Q. You say you had some farm wagons?

A. Yes; and the hay I used to mow it with a scythe, because I had no hay enough to have a machine and I mowed it with a scythe myself.

Q. Did you ever clear any brush?

A. I did. I cleared brush and last year I clear 100 feet of brush in back of McDonald's house, all the trees and everything else; and I cleared every bit of the brush that is there cleared; everything has been cleared out by me. And anybody can prove that I bought from Mr. McDonald a team of horses that he was selling at auction; they had belonged to a peddler and he died and his team and wagon was to be sold by auction; and McDonald was appointed to be the auctioneer, and I bought the team of horses from McDonald for \$60.00.

Q. Now, did you ever have any conversation with McDonald in which you said you had no claim to this land?

A. I had no claim?

Q. Yes. Did you ever tell McDonald that you had no claim?

A. No, sir; I never had no conversation with him at all.

Q. Did you ever make that statement to McDonald that you had no claim to this land?

(Testimony of John Trodick.)

A. No, sir; I never made any statement to McDonald that I didn't claim that land.

Q. Now, did you ever protest to or warn McDonald not to put up his building?

A. Yes, I did; and we had a fight when he cut my fence down there, and I got a fight with him; I said, "If it comes to a fight, I have got to fight." And when his son McDonald built that house below, and I forbid him to build there.

Q. Did you ever tell McDonald that you bought land of Auchard two or three years before he bought himself, or at any time?

A. No, sir.

Q. Did you ever tell him this at any other time, that you bought land of Auchard?

A. No, sir; because it wasn't so.

Q. Now, Mr. Trodick, excluding all the improvements that you put on the land yourself, and that *Lammlein* had on the land, what would you say the land was worth for farming and agricultural purposes?

Mr. BULLARD.—Objected to as not rebuttal and part of plaintiff's case in chief.

A. A. Well, I would give the same agreement now, that is, as before. I am not going to tell a story about it. I wouldn't sell for three thousand dollars my improvements and buildings and everything else that is there.

Q. You wouldn't sell for \$3,000?

A. No, sir.

(Testimony of John Trodick.)

Cross-examination.

(By Mr. BULLARD.)

Q. Mr. Trodick, this land for which you paid Auchard \$50.00 was a part of the Wolf Creek townsite, a part of the land in controversy in this case, wasn't it?

A. Why, of the right to the lot I bought?

Q. That was what you paid him fifty dollars for.

A. Yes.

Q. And it is part of the Wolf Creek townsite?

A. Yes, sir.

Q. And it is a part of the land that is in controversy in this suit, isn't it?

A. Yes; but you know I didn't buy from him--

Q. All right—that is all.

Redirect.

(By Mr. LOEB.)

Q. You were simply paying for your *pace*?

A. I said, "Mr. Auchard, I give you fifty dollars for the lot my house is standing on—my saloon, to have no trouble or any fight about it at all until the case is decided."

That is all.

His

JOHN X TRODICK.

Mark

Subscribed and sworn to before me this 20 day of February, A. D. 1905.

A. K. BARBOUR,
Special Examiner.

Mr. LOEB.—That closes the testimony in the hearing.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

No. 702.

JOHN TRODICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY
et al.,

Defendants.

Master's Certificate to Testimony and Exhibits.

I, Henry N. Blake, Standing Master in Chancery and Examiner, do hereby certify that under the order of said Court, made and entered September 20, 1904, I commenced to take the testimony therein upon the dates in the transcript hereafter mentioned; that H. L. Billings, William Brown, John W. Eddy, Nicholas Hilger, F. D. Miracle, F. L. Reece, John H. Shober, John Trodick, J. R. Whitmire, and Charles Worth, appeared before me at the place in the transcript hereinafter mentioned, and were by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth; that their testimony was taken in shorthand by R. F. Gaines, the stenographer appointed with the consent of the parties hereto, and afterwards transcribed; that when transcribed the same was read, corrected, subscribed, and verified by each of said witnesses in my presence; that at the

hearing Albert I. Loeb, Esquire, appeared for the complainant; that William Wallace, Jr., Esquire, appeared for the defendant Northern Pacific Railway Company, and Massena Bullard, Esquire, appeared for the defendant, Agnes Auchard, as administratrix with the will annexed of David Auchard, deceased, and Albion McDonald appeared in person.

That said testimony is contained in the transcript herewith filed on pages 1 to 159, inclusive.

I herewith transmit the following described exhibits offered at said hearing by the respective parties, to wit: Plaintiff's Exhibits marked "A," "C," "E," "F," and "G," and defendants' exhibit marked 1.

HENRY N. BLAKE,
Examiner.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

No. 702.

JOHN TRODRICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY
et al.,

Defendants.

Special Examiner's Certificate and Report

To the Honorable Judge of the United States Circuit Court, for the District of Montana.

I hereby certify and report that, in pursuance of an order made and entered herein on the 11th day of

January, A. D. 1905, as Special Examiner in said cause, I proceeded to take the testimony in the above-entitled action upon the 12th day of January, A. D. 1905, and continued therein, adjourning from time to time, by agreement of counsel, as appears in the transcript of said hearing, until the 15th day of February, A. D. 1905, when said hearing was completed; and that the said testimony, embracing two hundred and — pages, together with defendants' exhibits one (1), A-1, A-2, A-3 and A-5, and also the several stipulations of counsel, made and entered into at said hearing, as well as those filed with me as such Special Examiner at said hearing, is hereby transmitted.

A. K. BARBOUR,
Special Examiner.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

No. 702.

JOHN TRODRICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY
et al.,

Defendants.

Examiner's Certificate and Report.

I, A. K. Barbour, Special Examiner, appointed by an order of the above-entitled court, made and entered in the above-entitled cause on the 11th day of January, A. D. 1905, do hereby certify that, the hear-

ing of the testimony in said cause was commenced before me on the 12th day of January, A. D. 1905, at Room No. 6, Granite Block, in the city of Helena, Montana, and regularly proceeded with from day to day thereafter until it was closed on the fifteenth day of February, A. D. 1905, adjournments thereof being had from the 12th to the 13th, and from the 13th to the 16th, and from the 16th to the 18th, and from the 18th to the 19th, and from the 19th to the 24th, and from the 24th to the 30th days of January, and from the 30th day of January to the 10th day of February, and from said 10th day of February to the 15th day thereof, 1905; and that all of said testimony was taken upon the 12th, 13th, 16th, 19th days of January, and the 15th day of February, A. D. 1905, as will more fully appear from the transcript of the said testimony by the stenographer thereof, herein above.

At said hearing Albert I. Loeb, Esq., appeared for the complainant, John *Trodrick*, William Wallace, appeared for the defendant, the Northern Pacific Railway Company, and Massena Bullard appeared for the defendant Agnes Auchard, as administratrix with the will annexed of David Auchard, deceased, and Albion McDonald appeared in person.

That following witnesses, to wit, Paul S. A. Bickle and John *Trodrick*, were produced and sworn in behalf of the complainant, and W. R. Ralston, in rebuttal in behalf of complainant, and the witnesses, Charles Foreman, John W. Wade, Albion McDonald, F. L. Reece, George W. Houghton, and W. R. Ralston were produced and sworn in behalf of the defendants; and the said witnesses, who were of sound mind

and lawful age, having been by me carefully examined and cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the within entitled cause, gave their testimony, which, by consent of counsel for the respective parties, was taken down stenographically, in the presence of the witnesses, and from their statements, and the said stenographic notes were afterwards reduced to writing by a typewriter, and the testimony as extended was thereafter read over by me to said witnesses, and by them corrected, and signed by said witnesses respectively, and by them verified at the dates and times as the same appear in the record thereof.

Dated this 24th day of February, 1905.

A. K. BARBOUR,
Special Examiner.

[Endorsed]: Title of Court and Cause. Transcript of Evidence. Filed July 3, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

That on said 3d day of July, A. D. 1905, the following exhibits were filed with the transcript of testimony herein, as follows, to wit:

Plaintiff's Exhibit "A."

DEPARTMENT OF THE INTERIOR.

Washington, D. C., December 24, 1898.

Register and Receiver, Helena, Montana.

Sir: I have considered the case of *John Trodick vs. Northern Pacific R. R. Co.*, involving the SE. ¼, Sec. 35, Tp. 15 N., R. 4 W., situated within the primary limits of the grant to the company, the right of

which attached July 6, 1882, when the map of the definite location of its road was filed.

The plat of survey embracing the land was filed in the local office August 10, 1891, and the tract was listed by the company September 21, 1892, per list No. 215.

The records of this office show no pre-existing adverse claims to the same.

Mr. *Trodrick* applied to make homestead entry for the land January 10, 1896, and being refused he appealed to this office, which affirmed your action May 26, 1896, without prejudice to his right to apply for a hearing to determine the status of the land July 6, 1882, when the right of the company became effective.

He applied for a hearing August 10, 1896, whereupon notice issued citing the parties in interest to appear at your office September 21, 1896. The hearing was continued from time to time until April 16, 1897, when both parties were represented.

It appears from the evidence adduced that one Martin Lemline established his residence on the land, with his family, in 1877, continued to reside there until his death, some time in 1891, and his improvements on the premises were of the estimated value of \$1,000.

Mr. *Trodrick* settled on the land in 1891, and since then has continuously resided there.

The material question for determination in this case is this: Did the settlement claim of Mr. Lemline except the land from the operation of the grant to the Company?

It is undoubtedly true that the land was occupied by Mr. Lemline when the right of the company attached, that he was qualified to make entry of the same and settled there with the intention of doing so, as the circumstances indicate. Had he lived until the plat of survey was filed in your office, he or his wife would, without doubt, have been allowed to perfect the claim by them initiated prior to July 2nd, 1882.

Since Mr. Lemline had no claim of record, and the claim of *Trodick* had its inception subsequent to the definite location of the road, it must be held that the land inured to the grant. (*N. P. R. R. Co. vs. Colburn*, 164 U. S. 537).

Your action is therefore approved and the application of *Trodick* is accordingly rejected, subject to the usual right of appeal within sixty days. You will advise him of this action, and make prompt report at the expiration of the appeal period.

The company will be notified from this office.

Very respectfully,

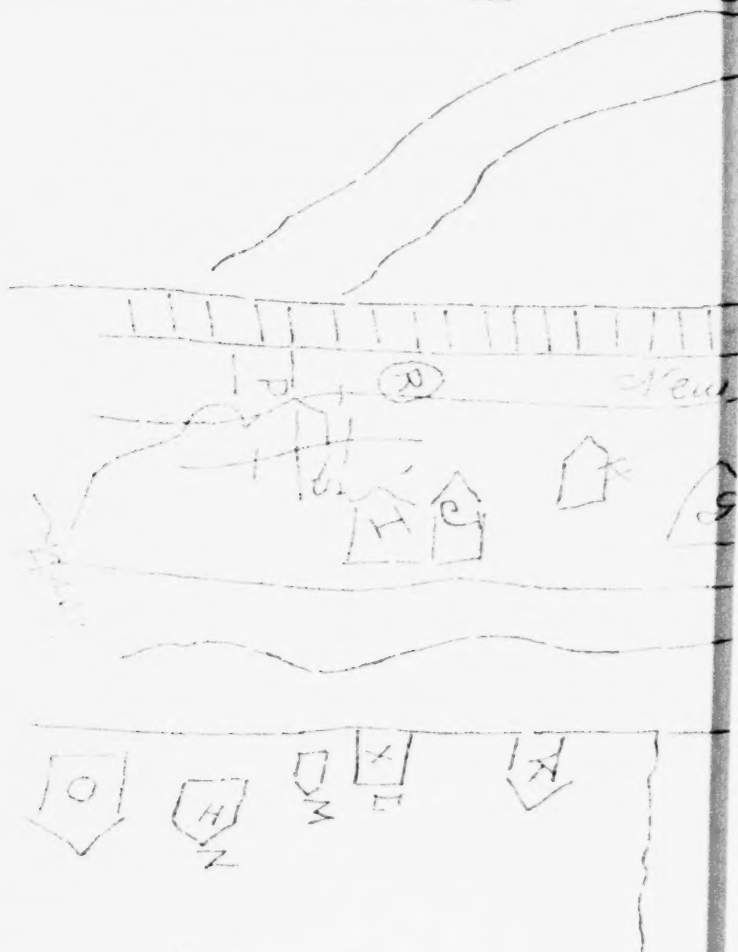
BINGER HERMANN,

Commissioner.

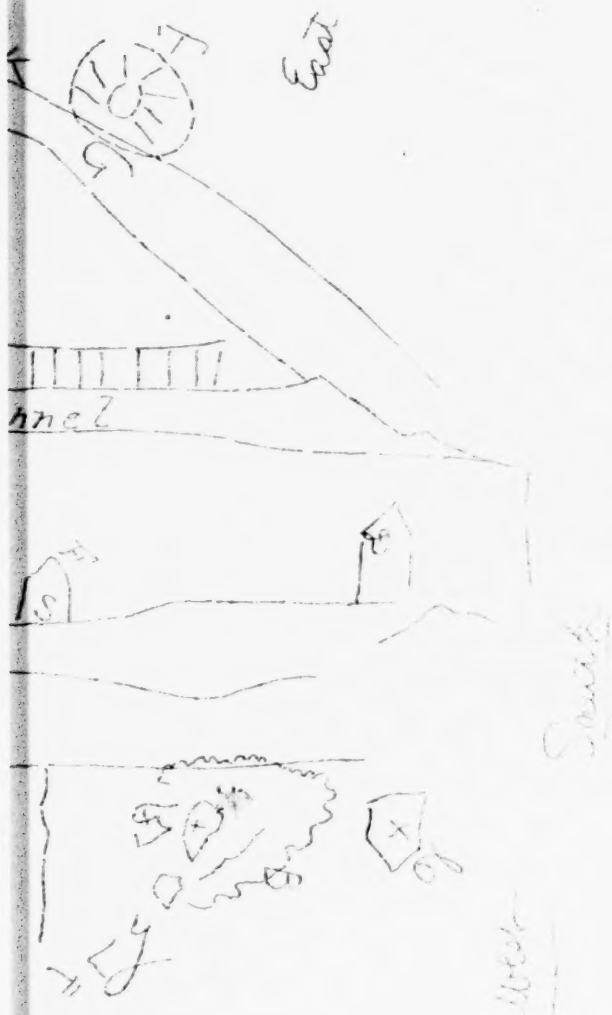
J. T. A.

[Endorsed]: 702. 9825. F. Dec. 24, 1898. John Trodick vs. N. P. R. R. Co. Affirms Decision of this Office Rejecting H. E. Application. Dec. 29, 98, F. L. Reece notified. Report March 11, 99. March 7th, 1899, Appeal Transmitted. Finis. Plaintiff's Exhibit "A." H. N. Blake, Examiner. Filed and Entered July 3, 1895. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

PLAINTIFFS EXHIBIT 'C'



[Endorsed] No 702 Plaintiff
Filed July 3, 1905. Geo W Spr



2. H. H. Blake, Examiner,
 K. by C. R. Garlow Deputy.

Plaintiff's Exhibit "D."

*In the District Court of the First Judicial District of
the State of Montana.*

Present: Hon. HORACE R. BUCK, Judge.

IN OPEN COURT.

In the Matter of the Application of JOHN TRODICK, an Alien, to become a citizen of the United States of America.

———Term, A. D. 1896, this 29th day of January, A. D. 1896, as yet of said term.

It appearing to the satisfaction of this court, by the oaths of Albion S. McDonald and Thomas Swanton, citizens of the United States of America, witnesses for that purpose, first duly sworn and examined, that John Trodick, a native of France, has resided within the limits and under the jurisdiction of the United States five years at least, last past; and within the State of Montana for one year, last past; and that during all of said five years' time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and it also appearing to the Court, by competent evidence, that the said applicant has heretofore, and more than two years since, and in due form of law, declared his intention to become a citizen of the United States; and having now here, before this Court, taken an oath that he will support the Constitution of the United States of America, and that he



Plaintiff's Exhibit "D."

*In the District Court of the First Judicial District of
the State of Montana.*

Present: Hon. HORACE R. BUCK, Judge.

IN OPEN COURT.

In the Matter of the Application of JOHN TRODICK, an Alien, to become a citizen of the United States of America.

———Term, A. D. 1896, this 29th day of January, A. D. 1896, as yet of said term.

It appearing to the satisfaction of this court, by the oaths of Albion S. McDonald and Thomas Swanton, citizens of the United States of America, witnesses for that purpose, first duly sworn and examined, that John Trodick, a native of France, has resided within the limits and under the jurisdiction of the United States five years at least, last past; and within the State of Montana for one year, last past; and that during all of said five years' time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and it also appearing to the Court, by competent evidence, that the said applicant has heretofore, and more than two years since, and in due form of law, declared his intention to become a citizen of the United States; and having now here, before this Court, taken an oath that he will support the Constitution of the United States of America, and that he

doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign Prince, Potentate, State or Sovereignty whatever, and particularly to the President of France,

It is therefore ordered, adjudged and decreed that the said John Trodick be and he is hereby admitted and declared to be a citizen of the United States of America.

HORACE R. BUCK,
Judge.

Signature: JOHN X TRODRICK

Witness to mark,

ALBION S. McDONALD.

Office of the Clerk of the District Court of the First
Judicial District of the State of Montana, in and
for the County of Lewis and Clark,—ss.

I, the undersigned, Clerk of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, said Court being a court of record, having common-law jurisdiction, and a Clerk and Seal, do certify that the above is a true copy of the act of Naturalization of John *Trodick* as the same appears upon the records of said court now in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 28th day of December, in the year of our Lord one thousand nine hundred and four, and in the year of our Independence the 129th.

[Seal]

FINLEY McRAE,
Clerk.

By Geo. E. Bayha,
Deputy Clerk.

[Endorsed]: No. 702. Plaintiff's Exhibit "D."
H. N. Blake, Examiner. Filed and entered July 3,
1905. Geo. W. Sproule, Clerk. By C. R. Garlow,
Deputy Clerk.

Plaintiff's Exhibit "E."

147467 B. M. F. H.

J. A.D.

DEPARTMENT OF THE INTERIOR.

General Land Office, Washington, D. C.

Feb. 27th, 1904.

I hereby certify that the annexed copies of paper
filed with the case of Northern Pacific R. R. Co. vs.
John *Troderick* are true and literal exemplifications
of the originals in this office.

In testimony whereof, I have hereunto subscribed
my name and caused the seal of this office to be
affixed, at the City of Washington, on the day and
year above written.

[Seal]

J. H. FIMPLE,

Acting Commissioner of the General Land Office.

*In the District Court of the First Judicial District
of the State of Montana.*

Present—Hon. HORACE R. BUCK, Judge.

In Open Court, this 29th day of January, A. D. 1896.

In the Matter of the Application of John *TRO-
DRICK*, an Alien, to Become a Citizen of the
United States of America.

It appearing to the satisfaction of this court by the
oaths of Albion S. McDonald and Thomas Swanton,
citizens of the United States of America, witnesses
for that purpose, first duly sworn and examined, that

John *Trodrick*, a native of France, has resided within the limits and under the jurisdiction of the United States five years at least, last past; and within the State of Montana for one year last past; and that during all of said five years' time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and it also appearing to the court, by competent evidence, that the said applicant has heretofore, and more more than two years since, and in due form of law, declared his attention to become a citizen of the United States, and having now here before this court taken an oath that he will support the Constitution of the United States of America, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every Prince, Potentate, State or Sovereignty whatever, and particularly to the President of France, It is therefore ordered, adjudged and decreed that the said John *Trodrick* be and is hereby admitted and declared to be a citizen of the United States of America.

HORACE R. BUCK,
Judge.

his

Signature: JOHN X *TRODRICK*.
mark

Witness: ALBION S. McDONALD.

Office of the Clerk of the District Court of the First
Judicial District of the State of Montana,—ss.

I, the undersigned, Clerk of the District Court of
the First Judicial District of the State of Montana,

said court being a court of record having common-law jurisdiction and a clerk and seal, do hereby certify that the above is a true copy of the Act of Naturalization of John *Trodrick* as the same appears upon the records of said court now in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 29th day of January, in the year of our Lord one thousand eight hundred and ninety-six and in the year of our Independence the one hundred and 20.

[Seal]

JESS. C. RICKER, Clerk.

By J. H. Cassedy,

Chief Deputy Clerk.

HOMESTEAD AFFIDAVIT.

DEPARTMENT OF THE INTERIOR,

United States Land Office,

Helena, Montana, January 29th, 1896.

I, John *Trodrick* of Wolf Creek, Montana, having filed my application No. —, for an entry under section 2289, Revised Statutes of the United States, do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that I am* a naturalized citizen of the

*Here insert statement that affiant is a citizen of the United States, or that he has filed his declaration of intention he became such, and that he is the head of a family, or is over twenty-one years of age, as the case may be. It should be stated whether applicant is native born or not, and if not, a certified copy of his certificate of naturalization, or declaration of intention, as the case may be, must be furnished.

(See page 45, circular of January 1, 1899.)

United States, and over the age of twenty-one years. That my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which I might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself, and further, that since August 30, 1890, I have not entered under the land laws of the United States, or filed upon, a quantity of land, agricultural in character, and not mineral, which, with the tracts now applied for, would make more than three hundred and twenty acres, and that I have

not heretofore made any entry under the homestead laws.

(Sign plainly with full Christian name.)

his

JOHN X TRODICK.

mark

Witness to mark:

THOMAS SWANTON.

Sworn to and subscribed before me this 29th day of January, 1896, at my office at Helena, in Lewis & Clark County, Montana.

JEREMIAH COLLINS,

Receiver.

NONMINERAL AFFIDAVIT.

This affidavit can be sworn to only on personal knowledge, and cannot be made on information and belief.

The Nonmineral Affidavit accompanying an entry of public land must be made by the party making the entry, and only before the officer taking the other affidavits required of the entryman.

DEPARTMENT OF THE INTERIOR,

United States Land Office,

Helena, Montana, January 29th, 1896.

John *Trodick*, being duly sworn according to law, deposes and says, that he is the identical person who is an applicant for Government title to the southeast quarter of Section No. 35, Township No. 15 North, of Range No. 4 West; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having fre-

quently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to the mineral land, but with the object of securing said land for agricultural purposes; and that his post-office address is Wolf Creek, Lewis & Clark County, Montana.

His

JOHN X TRODICK.

mark

Witness to mark:

THOMAS SWANTON.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by Frank L. Reece), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed

and sworn to before me at my office in Helena, Montana, within the Helena land district, on this 29th day of January, 1896.

JEREMIAH COLLINS,
Receiver.

Note.—The officer before whom the deposition is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law:

REVISED STATUTES OF THE UNITED STATES. Title LXX.—CRIMES.—Chap. 4.

Sec. 5392. Every person who, having taken an oath before a competent tribunal officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

6—903

HOMESTEAD.

Application No. ———.

Land Office at Helena, Montana,
January 29th, 1896.

I, John *Trodrick*, of Wolf Creek, Montana, do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the southeast quarter

of Section 35, in Township 15 North, of Range 4 West, containing 160 acres.

his

JOHN X TRODRICK.

mark

Witness to mark:

THOMAS SWANTON.

Land Office at _____,
_____, 189_____.

I, _____, Register of the Land Office, do hereby certify that the above application is for Surveyed lands of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

_____,
Register.

Homestead Application. John *Trodrick*, Helena, Montana. _____, 189_____. Fee & Com. tendered and returned Jan. 29, 1896, 4 P. M. J. Collins, Rec. Rejected 11 A. M. Jan. 30, 1896. U. S. Land Office, Helena, Montana. Filed Jan. 29, 1896, 4 P. M. Jeremiah Collins, Recr. Section 35, Town. 15 N., Range 4 W. M. L. 147467.

[Endorsed]: Plaintiff's Exhibit "E." H. N. Blake, Examiner. Filed and Entered July 3, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

Plaintiff's Exhibit "F."

This indenture made the 31st day of July, A. D. 1886, between Martin *Lammlein* and Kathrin *Lammlein*, his wife, of Cartersville, Lewis and Clark County, Montana Territory, of the first part, and the Montana Central Railway Company of the second part, witnesseth:

That the parties of the first part, for and in consideration of the sum of five hundred and fifty (550) dollars to them paid by said parties of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain and sell, convey and confirm unto said second party, its successors and assigns forever, all the following described tract or parcel of land, situate, lying and being in the county of Lewis and Clark, in said Territory, viz: All that certain piece, parcel or tract of land bounded and described as follows: Beginning at about station 2000, or where the fence divides between this land and that of Wm. Kisselpaugh on the west, or up Prickly Creek & extending down said creek or easterly to the east line thereof, or to about station 2035 and extending from the county road on the north to the said Prickly Pear Creek, on the south, and including the railway of the said company, as laid out and graded through said tract; but this is not intended to convey any of the fences, barns or corrals now on said property, but only the land as above bounded and described, T. 15, N., R. 4 W.

about $\frac{3}{4}$ mile below the village known as Cartersville. And all right and claim of said first parties to the use and occupancy of the surface of said premises for any purpose whatever; together with the tenements, hereditaments and appurtenances thereunto belonging, and all claim and demand whatsoever of the first parties both in law and in equity of, in and to the above-granted premises, with the hereditaments and appurtenances.

To have and to hold the same and every part thereof, unto the party of the second part, its successors and assigns forever. And said first parties hereby release to said second party any and all claims for any damages that may arise or be caused to the land adjoining such railroad, on either side thereof, in consequence of the use of said premises for its said road.

In witness whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written.

MARTIN LAMMLEIN. [Seal]

KATHRIN LAMMLEIN. [Seal]

Signed, sealed and delivered in the presence of
JNO. W. EDDY.

Territory of Montana,
County of Lewis and Clark,—ss.

On this 31st day of July, A. D. one thousand eight hundred and eighty-six, personally appeared before me Jno. W. Eddy, a notary public in and for Montana, Marttin *Lammlein* and Kathrin *Lammlein*, his wife, whose names are subscribed to the annexed

instrument as parties thereto, personally known to me to be the same persons described in and who executed the said annexed instrument as parties thereto, and who each of them acknowledged to me that they each of them respectively executed the same freely and voluntarily, and for the uses and purposes therein mentioned. And the said Kathrin *Lammlein*, wife of the said Martin *Lammlein*, having been by me first made acquainted with the contents of said instrument, acknowledged to me on examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or under influence of her husband, and that she does not wish to retract the execution of the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

JNO. W. EDDY,
Notary Public.

Filed and recorded August 12th, A. D. 1886, at 50 minutes past 2 P. M.

W. E. FREDERICK,
County Recorder.
By Wm. Coyne,
Deputy.

Recorder's Office,
State of Montana,
County of Lewis and Clark,—ss.

I, Sidney Miller, County Clerk and Ex-officio Recorder, in and for said county and State, hereby

certify that the above and foregoing is a full, true and correct copy of deed from Marttin *Lammlein* et ux. to the Montana Central Railway Company, as found in Book 7 of Deed on page 483, Records of said County.

In witness whereof, I have hereunto set my hand and affixed the seal of said County this 27th day of December, A. D. 1904.

[Seal]

SIDNEY MILLER,
County Clerk and Ex-officio Recorder.

By J. R. Whitmire,
Deputy.

[Endorsed]: No. 702. Plaintiff's Exhibit "F."
H. N. Blake, Examiner. Filed July 3, 1905. Geo.
W. Sproule, Clerk. By C. R. Garlow, Deputy.

Plaintiff's Exhibit "G."

"F."

C. S. B.

12-11263.

W. R. J.

Copy.

DEPARTMENT OF THE INTERIOR.

United States Land Office,

Washington, D. C., Dec. 24, 1898.

Register and Receiver, Helena, Montana.

Sir: I have considered the case of John *Trodick* vs. Northern Pacific R. R. Co., involving the SE. $\frac{1}{4}$, Sec. 35, Tp. 15 N., R. 4 W., situated within the primary limits of the grant to the company, the right of which attached July 6, 1882, when the map of the definite location of its road was filed.

The plat of survey embracing the land was filed in the local office August 10, 1891, and the tract was listed by the company September 21, 1892, per list No. 215.

The records of this office show no pre-existing adverse claims to the same.

Mr. *Trodrick* applied to make homestead entry for the land January 10, 1896, and being refused he appealed to this office, which affirmed your action May 26, 1896, without prejudice to his right to apply for a hearing to determine the status of the land July 6, 1882, when the right of the company became effective.

He applied for a hearing August 10, 1896, whereupon notice issued citing the parties in interest to appear at your office September 21, 1896. The hearing was continued from time to time until April 16, 1897, when both parties were represented.

It appears from the evidence adduced that one Martin Lemline established his residence on the land, with his family, in 1877, continued to reside there until his death, some time in 1891, and his improvements on the premises were of the estimated value of \$1,000.

Mr. *Trodrick* settled on the land in 1891, and since then has continuously resided there.

The material question for determination in this case is this: Did the settlement claim of Mr. Lemline except the land from the operation of the grant to the company?

It is undoubtedly true that the land was occupied by Mr. Lemline when the right of the company at-

tached, that he was qualified to make entry of the same and settled there with the intention of doing so, as the circumstances indicate. Had he lived until the plat of survey was filed in your office, he or his wife would, without doubt, have been allowed to perfect the claim by them initiated prior to July 6, 1882.

Since Mr. Lemline had no claim of record, and the claim of *Trodrick* had its inception subsequent to the definite location of the road, it must be held that the land inured to the grant. (*N. P. R. R. Co. v. Colburn*, 164 U. S. 537.)

Your action is therefore approved and the application of *Trodrick* is accordingly rejected, subject to the usual right of appeal within sixty days. You will advise him of this action, and make prompt report at the expiration of the appeal period.

The company will be notified from this office.

Very respectfully,

BENJ. HERMANN,

Commissioner.

J. T. A.

[Endorsed]: 9825. F. Dec. 24, 1898. *John Trodrick vs. N. P. R. R. Co.* Affirms Decision of this office Rejecting H. E. Application. Dec. 29/98. F. L. Reece Notified. Report Mar. 11/99. Mch. 7, 1899. Appeal Transmitted. Finis.

I, Frank D. Miracle, Register of the United States Land Office, Helena, Montana, do hereby certify that the above and foregoing letter is a true and correct copy of Commissioner's Letter "F" of De-

cember 24, 1898, delivered to me as Register of United States Land Office, Helena, Montana, with the regular files of said office.

FRANK D. MIRACLE,

Register.

[Endorsed]: 702. Plaintiff's Exhibit "G." H. N. Blake, Examiner. Filed and Entered July 3, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

Defendant's Exhibit 1.

This agreement, made and entered into this first day of February, A. D. 1891, by and between John Trodick of Wolf Creek, Lewis & Clark Co., State of Montana, party of the first part, and Chas. Forman & Geo. Forman of the firm of Forman Bros., Wolf Creek, L. & C. Co., Montana, parties of the second part, witnesseth;

That the said party of the first part, for and in consideration of the rents and covenants hereinafter mentioned and to be paid and performed by the said parties of the second part, has demised, leased and let, and by these presents do demise, lease and let unto the said parties of the second part, the following described property, to wit:

A certain rectangular piece of land, being seventy feet by four hundred feet (70x400), lying and situated on the north side of the Ft. Benton & Helena Stage Road, opposite the R. R. station at Wolf Cr. on the Mont. Cent. R. R. in the County of Lewis & Clark, State of Montana, the said piece and parcel of land aforesaid to face seventy feet front on the Benton Rd. and to run back at right angles four hundred feet, the S. W. cor. of said land to be twelve ft. westerly of the S. W. Cor. of the building now on said land and owned and occupied by Forman Bros. The S. E. corner of said land to be forty feet easterly from S. E. corner of said building; other two corners at right angles four hundred ft. northerly from said corners of lot above described.

To have and to hold the above rented land to the parties of the second part, their heirs, executors, administrators and assigns, for and during the full term of five years from and after the first day of February, 1891.

And the said parties of the second part, for themselves & heirs, executors, administrators and assigns, agree to and with the said party of the first part, to pay him & his heirs, executors, administrators and assigns, as rent for the above mentioned five years the sum of twenty 00/100 Dollars per annum, paid in advance for and during the term of this lease.

And it is further agreed by and between the parties, as follows: That should the said parties of the second part, their heirs, executors, administrators or assigns, fail to make the above mentioned payments as herein specified, or fail to fulfill any of the covenants herein contained, then and in that case it shall be lawful for the said party of the first part, his heirs, executors, administrators or assigns, to re-enter, and take full and absolute possession of the above rented land and hold and enjoy the same fully and absolutely, without such re-entering working a forfeiture of the rents to be paid and the covenants to be performed by the said parties of the second part, their heirs, executors, administrators or assigns, for the full term of this lease.

And the said parties of the second part also covenant and agree to and with the said party of the first part, not to sublet the above rented land or any part thereof, during the full term of this lease, without first obtaining the consent of the said party

of the first part, his heirs, executors, administrators or assigns, thereto, and that they will, at the expiration of the time as herein recited, quietly yield and surrender the aforesaid rented land to the said party of the first part, his heirs, executors, administrators or assigns, in as good condition and repair as when they took them, reasonable wear and tear and damage by the elements to be alone excepted.

In testimony whereof, both parties have hereunto set their hands and seals this first day of February, A. D. 1891.

JOHN X TRODICK.

(his mark)

Witness to mark:

EDW. E. BILLINGS.

State of Montana,

County of Lewis and Clark,—ss.

Be it known, that on this first day of February, 1891, came before me personally John Trodick, of Wolf Cr. L. & C. Co., Montana, to me well known to be the same person who executed the annexed and foregoing lease, and he acknowledged that he executed the same as and for his own free act and deed, for the uses and purposes therein expressed.

[Notarial Seal] EDW. E. BILLINGS,
Notary Public.

[Endorsed]: No. 702. Deft's Exhibit 1. H. N. Blake, Examiner. John Trodick. Lease of Premises at Wolf Cr. Station to Forman Bros. Filed and Entered July 3, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

Defendant's Exhibit "A-1."

Fulton, Mont., July 3, 1899.

Received of John *Troderick* Fifty Dollars as the first installment on the purchase of part of Lot 8, Block 1 West 40 ft. lot 6 block 1 lot 5 in block 4 total 240 feet in case it does not interfere with Charles *Foremans* clame.

DAVID AUCHARD.

[Endorsed]: No. 702. Exhibit A-1, by Defendant. A. K. Barbour, Exa. Filed and entered nunc pro tunc July 3, 1905. Geo. W. Sproule, Clerk.

Defendant's Exhibit "A-2."

Wolf Creek, Feb. 1st, 1891.

Received of Forman Bros. the sum of \$20 Twenty Dollars for one lot to Feb. 1st, 1892.

JOHN TRODICK.

[Endorsed]: No. 702. Defendant's Ex. A-2. A. K. Barbour, Exmr. Filed and entered nunc pro tunc July 3, 1905. Geo. W. Sproule, Clerk.

Defendant's Exhibit "A-5."**NOTICE.**

The undersigned, who is a citizen of the United States, did on the first day of January, A. D. 1889, discover valuable mineral deposits, to wit, sandstone, in the public lands of the United States, and did on the said day locate, a mineral claim embracing said

sandstone, said claim being bounded and described as follows, to wit: Beginning at a stake at which this notice is posted, marked No. 1 A. S. McD.; planted one hundred feet north of the center of the main track on the north boundary line of the right of way of the Montana Central Railway, from which stake the section-house of said railway bears west about 18 feet; running thence (from said stake) northerly fifteen hundred feet to a stake marked No. 2 A. S. McD.; running thence easterly six hundred feet to a stake marked No. 3, A. S. McD.; running thence southerly fifteen hundred feet to a stake marked No. 4, A. S. McD.; running thence westerly six hundred feet to said stake No. 1. Said claim is situate, lying and being at Wolf Creek Station on said Railway, in Lewis and Clarke County, Montana Territory, and is parcel of the unsurveyed mineral lands of the United States. Said land is more valuable for said sandstone (which has a commercial value) than for agricultural purposes, and said discovery of said sandstone is within the boundaries of said claim.

Discovered, located and dated January 1st, A. D. 1889.

ALBION S. McDONALD.

Montana Territory,
County of Lewis & Clark,—ss.

Albin S. McDonald, being duly sworn, on his oath deposes and says: That he is a citizen of the United States and the locator and claimant of the mineral claim described in the foregoing notice, and that the facts contained in said notice, together with the de-

scription of said mineral claim as therein stated, are true.

ALBION S. McDONALD.

Subscribed and sworn to before me this 14th day of January, A. D. 1889.

[Seal]

EDW. E. BILLINGS,
Notary Public.

Filed for record January 16th, A. D. 1889, at 3:27 P. M. J. S. Tooker, Recorder. By Sherwood Wheaton, Deputy.

State of Montana,
County of Lewis & Clark,—ss.

I, Percy R. Witmer, County Clerk and Ex-Officio Recorder in and for said County and State, do hereby certify that the above and foregoing is a full, true, correct and compared copy of the location of a Sandstone claim made by Albion S. McDonald, as found in Book "3" of Lodes at page 501, Records of said County.

In witness whereof, I have hereunto set my hand and affixed the seal of said County this 28th day of January, A. D. 1905.

[Seal]

PERCY R. WITMER,
County Clerk and Ex-Officio Recorder.

By A. J. Duncan,
Deputy.

[Endorsed]: 702. Defendants' Exhibit A-5.
A. K. B. Filed and entered nunc pro tunc July 3,
1905. Geo. W. Sproule, Clerk.

That on the 15th day of July, 1907, the opinion of the court was filed herein, which said opinion is in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

JOHN TRODRICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY
(a Corporation), ALBION McDONALD,
and AGNES AUCHARD, as Administratrix
with the Will Annexed of DAVID AU-
CHARD, Deceased,

Defendants.

Opinion of the Court.

HUNT, Judge (Orally):

Complainant brings this suit to obtain a decree establishing his ownership of a certain piece of land within section 35, township 15, north, range 4 west, and to have the patent title given by the United States to the Northern Pacific Railway Company, and by the railway company transferred to its co-defendants, held in trust.

The land is within what is known as the forty-mile limit. One *Lamlein* was living upon the land on July 6, 1882, when the Northern Pacific Railroad Company filed its map of definite location. He lived there until his death, in August, 1889. The land was then unsurveyed. *Trodrick* bought from *Lamlein*

before *Lamlein's* death, and has lived upon the land since shortly after his purchase. In 1891, the land was surveyed, and the plats filed in the local land office on August 10, 1891. On September 21, 1892, the land was listed by the railroad company. On January 10, 1896, *Trodrick* applied to enter the land by homestead, but was denied the right without prejudice to his right to apply to be heard as to the conditions that existed on July 6, 1882, when the map of definite location was filed. Hearing was had in August, 1896, and on December 24, 1898, *Trodrick's* application to enter the land was denied by the land officials, upon the ground that since *Lamlein* had no claim of record, and the *Trodrick* claim had its inception subsequent to the definite location of the road, the land passed to the grant.

Northern Pacific Ry. Co. vs. Colburn, 164 U. S. 383.

By the Act of Congress of May 14, 1880 (Vol. 21, U. S. Statutes at Large, 140), the settler upon public unsurveyed lands, who intended to claim under the homestead laws, was allowed the same time to file his homestead application, and to perfect his original entry in the United States land office, as was allowed to a pre-emption settler to put his claim on record, and it was provided that his right should relate back to the date of settlement, the same as if he settled under the pre-emption laws. This would have given *Lamlein*, had he lived, ninety days after the filing of the township plat (August 10, 1891), within which time he was obliged to put his application for entry on file, so as to become of record.

He had sold, however, to *Trodrick* in 1889, so that the very best possible position that may be conceded to *Trodrick* is such as *Lamlein* could have occupied, if he had not sold, and had lived until after the plats of survey were filed. But even upon such a concession, it became his duty, as it would have been *Lamlein's* duty, to file his application for homestead within ninety days after the filing of the township plat in 1891. He failed to do so, though, and by his omission he lost his rights to enter the land under the homestead laws.

The case is therefore one where the occupant, having failed to take the necessary steps to file his application until long after survey and filing, the land passed to the railroad grant, and no claim of ownership can be made at this time. As I read the case of *Nelson vs. Northern Pacific Ry. Co.*, 188 U. S. 109, and *Oregon and California R. R. Company vs. United States*, 189 U. S. 103, and the cases therein cited, they sustain these views.

Without going into the matter at length, the question has repeatedly occurred to me how *Trodrick* can derive advantage by *Lamlein's* occupancy. Certainly *Lamlein* gave up his right of claim to a homestead when he sold before his death. As against the United States, he could not have made a valid entry under the homestead law after his sale or agreement of sale to *Trodrick*. What right, therefore, other than that of the ordinary settler on unsurveyed land, did *Trodrick* acquire? None, it seems to me. This being so, *Trodrick* is in no position to assert

possible advantage, because of settlement and occupancy in July, 1882, that might have accrued to *Lamlein*, if he had lived, *and if he had not sold out*.

The facts in the record make it plain to me that *Trodrick* only has such equities as his own conduct entitled him to, irrespective of contingencies that might have arisen to make *Lamlein's* case one where entry by him would have been protected under the law.

As a court of equity, however, this Court is bound by statutory requirements, as is a Court of law, and where a party has failed to do an act necessary to be done as a predicate for rights within the time limited for doing it under the law, equity cannot interpose to confer the lost right, or to unsettle rights which have passed to others by law.

The defendants are entitled to a decree.

So ordered.

[Endorsed]: Title of Court and Cause. Filed July 15, 1907. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 11th day of January, 1908, the complainant filed his assignment of errors herein, which said assignment of errors is in words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

JOHN TRODICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD, and AGNES
AUCHARD, as Administratrix, with the
Will Annexed of DAVID AUCHARD, De-
ceased,

Defendants.

Assignment of Errors.

Comes now the complainant in the above-entitled cause, and says that in the decree herein, made and entered on the 18th day of July, 1907, dismissing the bill of complaint of the complainant herein, there is manifest error, and files the following assignment of errors, committed or happening in said cause, upon which he will rely on his appeal from said decree:

I.

It was error in the Court to rule or hold that the right of the complainant to the premises described in his bill of complaint was affected by or lost to the complainant by reason of his failure to file in the proper United States Land Office, an application to

enter said lands as a homestead within ninety days after the filing of the township plat of the survey of said lands, to wit, within ninety days after the 10th day of August, 1891.

II.

It was error in the Court to hold, inasmuch as the lands mentioned in the bill of complaint were occupied by a bona fide settler at the time of the filing of the map of definite location of the defendant company's railroad, to wit, on July 6, 1882, who, having theretofore settled on the said lands and being qualified to enter the same under the homestead laws of the United States, intended to enter the same under said laws when the same should be surveyed, any title was acquired to the said lands by the Northern Pacific Railroad Company, or its successor in interest, the defendant company, by virtue of the grant to the Northern Pacific Railroad Company.

III.

It was error in the Court not to hold or find that the lands described in the bill of complaint were excepted out of the grant to the Northern Pacific Railroad Company, under the Act of Congress, by reason of the fact that such lands at the time of the filing of the map of definite location of the railroad of the said company, were actually occupied by a bona fide qualified homesteader, who resided thereon intending to enter the said lands under the homestead laws when the same should be surveyed.

IV.

It was error in the Court to hold that the lands

described in the bill of complaint were not open to entry by the complainant under the provision of the homestead laws of the United States, at the time he applied to enter the same.

V.

It was error in the Court to hold that the complainant could not claim any advantage because of the settlement and occupancy of the lands described in the bill of complaint, at and prior to the time of the filing of the map of definite location by the Northern Pacific Railroad Company of its line of railroad, for that, by reason of such settlement and occupancy, such lands were excepted from the grant to the railroad company and remained lands subject only to the preference right of the occupying claimant Lemline to enter the same under the homestead laws.

VI.

It was error in the Court not to find that in the year 1877, Martin Lemline settled upon the land described in the bill of complaint, intending to enter the same under the homestead laws of the United States, and that with such intention he continued to reside thereon until the month of August, 1889, the said lands being during all of said time and until the 10th day of August, 1891, unsurveyed land.

VII.

It was error in the Court not to find that whatever rights any of the defendants may have in the premises were acquired with full knowledge and notice of the rights of the complainant.

VIII.

It was error in the Court not to find that the complainant purchased all the rights of the original occupant of the said lands, Martin Lemline, in the year 1889, and that he has continuously resided upon said land ever since said date intending to enter the same under the homestead laws of the United States, being at all said times a duly qualified homesteader.

IX.

It was error in the Court not to find that the complainant is and always has been ready and willing to pay to the defendant Northern Pacific Railway Company, or to the other defendants, such sum of money as was expended by them in securing from the United States the patent to the land described in the bill of complaint, and to fail to find the amount properly chargeable against complainant on account of such expenses.

X.

It was error in the Court to render or enter its decree herein dismissing the bill of complaint.

XI.

It was error in the Court not to find and hold that the defendants hold the title to the land described in the bill of complaint in trust for the plaintiff, and to fail to enter its decree adjudging that they convey the said premises to him upon the payment of such sum as the Court may find to have been expended in the procuring of the patent to the same from the Government of the United States.

Wherefore, the above-named complainant, conceiving himself aggrieved by the said decree, made

and entered as aforesaid on the 18th day of July, 1907, prays that the said decree be reversed, and that a decree be entered herein adjudging that the complainant is the owner of the lands described in the bill of complaint, and that the defendants hold the title to the same in trust for him, and that the defendant Northern Pacific Railway Company be commanded to execute and deliver to the complainant a conveyance of the said lands, upon the payment to it of the expenses incurred by it in obtaining patent to be issued to it for the same, and that the defendants, and each of them, be enjoined and restrained from asserting any title to the said premises.

WALSH & NOLAN,
Solicitors for Complainant.

C. B. NOLAN, and

T. J. WALSH,

Counsel for Complainant.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed Jan. 11, 1908. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 11th day of January, 1908, an order allowing appeal was duly made and entered herein, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

JOHN TRODICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD, and AGNES
AUCHARD, Administratrix with the Will
Annexed of DAVID AUCHARD, Deceased.

Defendants.

Order Allowing Appeal, etc.

On this 11th day of January, 1908, came the above-named complainant, John Trodick, by his solicitors, Messrs. Walsh & Nolan, and moved the Court to be allowed an appeal from the decree of this Court herein rendered and entered on the 18th day of July, 1907, in favor of the defendants and against the complainant, to the United States Circuit Court of Appeals for the Ninth Circuit.

On the filing of the assignment of errors by the said complainant, the Court does hereby allow the said appeal, and does hereby fix the amount of the bond on the said appeal in the sum of three hundred dollars, and the Court further orders that a certified transcript of the record, proceedings and papers upon which said decree appealed from was based or ren-

dered, duly authenticated, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 11th day of January, 1908.

By the Court,

WILLIAM H. HUNT,

Judge.

[Endorsed]: Title of Court and Cause. Order Allowing Appeal. Filed and Entered Jan. 11, 1908. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 11th day of January, 1908, the complainant filed his Bond on Appeal herein, which said bond is in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

JOHN TRODICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES
AUCHARD, as Administratrix, with the
Will Annexed of DAVID AUCHARD, De-
ceased,

Defendants.

Bond on Appeal.

Know all men by these presents: That we, John Trodick, of Lewis and Clark County, Montana, as principal, and United States Fidelity and Guaranty

Company, a corporation, as surety, are held and firmly bound unto the above-named Northern Pacific Railway Company, a corporation, Albion McDonald and Agnes Auchard, as administratrix with the will annexed of David Auchard, deceased, in the sum of three hundred dollars, to be paid to the said Northern Pacific Railway Company, a corporation, Albion McDonald and Agnes Auchard, as administratrix with the will annexed of David Auchard, deceased, for the payment of which, well and truly to be made, we bind ourselves jointly and severally, and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this —— day of January, 1908.

Whereas, the above-named complainant has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a decree rendered in the above-entitled cause, in the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, on the 18th day of July, 1907.

Now, therefore, the condition of this obligation is such that if the above-named complainant, John Trodick, shall prosecute said appeal to effect and answer all damages and costs, if he fail to make his plea

good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN TRODICK,
By WALSH & NOLAN,
His Solicitors.

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY,

[Seal] By GEO. L. RAMSEY,
Its Attorney in Fact.

The foregoing bond is hereby approved this 11th day of January, 1908.

WM. H. HUNT,
Judge.

[Endorsed]: Title of Court and Cause. Bond on Appeal. Filed Jan. 11, 1908. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 11th day of January, 1908, a Citation was duly issued herein, which is hereto annexed, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

JOHN TRODICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES AUCHARD, as Administratrix with the Will Annexed of DAVID AUCHARD, Deceased.

Defendants.

Citation on Appeal (Original).

United States of America—ss.

The President of the United States to Northern Pacific Railway Company, Albion McDonald and Agnes Auchard, as administratrix with the will annexed of David Auchard, deceased, and to Messrs. Wallace & Donnelly and Massena Bullard, Esquire., their solicitors:

You are hereby cited and admonished to *be appear* at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the clerk of the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, wherein John Trodick is complainant and appellant and Northern Pacific Railway Company, a corporation, and Albion McDonald, and Agnes Auchard, as administratrix with the will annexed of David Auchard, deceased, are defendants and appellees, to show cause if any there be why the judgment and decree in said appeal mentioned dismissing the bill of complaint of the *complaint* should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable WILLIAM H. HUNT, Judge of the United States District Court for the District of Montana, presiding in the Circuit Court

for the District of Montana, this 11th day of January 1908.

WM. H. HUNT,
District Judge.

[Endorsed]: No. 702. In U. S. Circuit Court, Ninth Circuit, District of Montana. John Trodick, Complainant, vs. Northern Pacific Railway Company et al., Defendants. Citation. Filed Jan. 11th, 1908. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk. Walsh & Nolan, Helena, Mont., Solicitors for Complainant.

Due personal service of within citation made and admitted and receipt of copy acknowledged this 11th day of January, 1908.

WALLACE & DONNELLY,
Solicitors for Northern Pacific Railway Co.

MASSENA BULLARD,
Solicitor for Defendant Agnes Auchard, Administratrix, etc.

And thereafter, to wit, on the 24th day of January, 1908, a Stipulation relative to original exhibits was filed herein, which said stipulation is in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

JOHN TRODICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES AUCHARD, as Administratrix with the Will Annexed of DAVID AUCHARD, Deceased.

Defendants.

Stipulation Relative to Complainant's Original Exhibit No. 1.

It is hereby stipulated and agreed, by and between the parties to the above-entitled cause, that complainant's Original Exhibit No. 1, being a map of the town-site of Wolf Creek, introduced in evidence as an original exhibit on the hearing of said cause, may be transmitted by the clerk of the above-entitled court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, and may be, by the clerk of said Circuit Court of Appeals, filed in said Circuit Court of Appeals with the record of said cause, and that when so filed the said exhibit may, upon the argument of the appeal of the complainant in said cause, from the

decree of the above-entitled court in said cause, to said Circuit Court of Appeals, and for all purposes in said Circuit Court of Appeals be inspected, used and considered with the same force and effect as if reproduced and made a part of said record in said cause, which is to be transmitted by the clerk of the above-entitled court to said Circuit Court of Appeals, and as if incorporated in the printed record to be used on said appeal.

It is further stipulated that the said exhibit coming within the classes of exhibits specified in subdivision 4 of Rule XIV of the rules of said United States Circuit Court of Appeals, and it being proper that said exhibit should be inspected in said Circuit Court of Appeals, upon said appeal, an order may be made for the transmission of the same to said Circuit Court of Appeals, in accordance with said rule.

Dated this 24th day of January, 1908.

WALSH & NOLAN,
Solicitors for Complainant.

WM. WLALACE, Jr.,
Solicitors for Defendant Northern Pacific Railway
Company.

MASSENA BULLARD,
Solicitors for Defendant Agnes Auchard, Adminis-
tratrix with the will annexed of David Auchard,
deceased.

[Endorsed]: Title of Court and Cause. Stipula-
tion Relative to Original Exhibits. Filed Jan. 24,
1908. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 24th day of January, 1908, an Order relative to original exhibits was made and entered herein, said Order being in words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

JOHN TRODICK,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES AU-
CHARD, as Administratrix with the Will
Annexed of DAVID AUCHARD, Deceased.

Defendants.

**Order Directing Transmission of Complainant's
Original Exhibit No. 1 to Circuit Court of Appeals.**

It appearing to the undersigned, a Judge of the United States District Court in and for the District of Idaho, presiding in the above-entitled court, that it is proper that Complainant's Exhibit No. 1, used on the hearing in the above-entitled cause, should be inspected in the United States Circuit Court of Appeals, in and for the Ninth Circuit, at San Francisco, California, upon the appeal of the above-named complainant from the judgment of the above-entitled court, in said cause to said Circuit Court of Appeals, on motion of Messrs. Walsh & Nolan, solicitors for complainant, and pursuant to stipulation, it is ordered:

That the clerk of the above-entitled court transmit to said Circuit Court of Appeals Complainant's Original Exhibit No. 1, introduced in evidence as an original exhibit upon the hearing of said cause, so that he have the same in said Circuit Court of Appeals, and file the same therein at the same time that the record on appeal in said cause is filed in said court.

Dated this 24th day of January, 1908.

FRANK S. DIETRICH,

Judge U. S. District Court, District of Idaho, Presiding in said Circuit Court.

[Endorsed]: Title of Court and Cause. Order Relative to Original Exhibits. Filed and Entered Jan. 24, 1908. Geo. W. Sproule, Clerk.

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court, Ninth Circuit, in and for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 522 pages, numbered consecutively from 1 to 522, is a true and correct transcript of the pleadings, process, orders, decree, testimony, exhibits, opinion, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed

to said transcript and included within said paging the original citation issued in said cause.

I further certify and return that the costs of the transcript of record amount to the sum of two hundred twenty-eight 65/100 dollars (\$228.65/100), and have been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States Circuit Court, Ninth Circuit, District of Montana, at Helena, Montana, this 28th day of January, A. D. 1908.

[Seal]

GEO. W. SPROULE,

Clerk.

[Endorsed]: No. 1563. United States Circuit Court of Appeals for the Ninth Circuit. John Trodick, Appellant, vs. The Northern Pacific Railway Company (a Corporation), and Albion McDonald, and Agnes Auchard, as Administratrix with the Will Annexed of David Auchard, Deceased, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Montana.

Filed February 10, 1908.

F. D. MONCKTON,

Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1563.

JOHN TRODICK, Appellant,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, ET AL.,
Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing five hundred and fifty (550) pages, numbered from one (1) to five hundred and fifty, both inclusive, to be a true copy of the printed Transcript of Record upon Appeal from the United States Circuit Court for the District of Montana in the above-entitled case as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit, and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, this tenth day of December, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1563.

JOHN TRODICK, Appellant,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and
ALBION McDONALD, and AGNES AUCHARD, as Administratrix
with the Will Annexed of David Auchard, Deceased, Appellees.

*Proceedings Had in the United States Circuit Court of Appeals for
the Ninth Circuit.*

(Addenda.)

Names and addresses of counsel of record:

Counsel for Appellant: Walsh & Nolan, Penwell Block, Helena, Montana.

Counsel for Appellees: Massena Bullard, Room 8, Gold Block, Helena, Montana; William Wallace, Jr., Helena, Montana; Charles Donnelly, St. Paul, Minn.

At a stated term, to-wit: the October term A. D. 1907 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Francisco, on Wednesday, the twentieth day of May in the year of our Lord one thousand, nine hundred and eight.

Present: Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

No. 1563.

JOHN TRODICK, Appellant,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, Appellees.

Order of Submission.

Ordered, appeal in the above-entitled cause argued by Mr. T. J. Walsh, counsel for the appellant, and Mr. Charles Donnelly, counsel for the appellees, and submitted to the Court for consideration and decision, with leave to counsel for the appellant to file a reply brief within thirty (30) days from date.

Upon motion of counsel for the appellant, it is further ordered that an alias citation on appeal to Albion McDonald in the above-entitled cause be filed.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

JOHN TRODICK, Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, ALBION McDONALD, and AGNES AUCHARD, as Administratrix with the Will Annexed of David Auchard, Deceased, Defendants.

Alias Citation on Appeal.

UNITED STATES OF AMERICA, *vs.*

The President of the United States to Albion McDonald:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty days from the date of the service of this citation upon you, pursuant to an appeal filed in the office of the Clerk of the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, wherein John Trodick is complainant and appellant and Northern Pacific Railway Company, a corporation and Albion

McDonald and Agnes Auchard, as administratrix with the will annexed of David Auchard, deceased, are defendants and appellees, to show cause if any there be why the judgment and decree in said appeal mentioned, dismissing the bill of complaint of the complainant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Hunt, Judge of the United States District Court for the District of Montana, presiding in the Circuit Court of the United States for the Ninth Circuit, District of Montana, this 29 day of April, A. D. 1908.

WILLIAM H. HUNT,
District Judge.

Marshal's Return.

UNITED STATES OF AMERICA,
District and State of Montana, County
of Lewis & Clark, Office of the Marshal, ss:

I hereby certify that I received the within citation on the 1st day of May, A. D. 1908, and personally served the same on the 1st day of May, A. D. 1908, on Albion McDonald, at Wolf Creek in said County of Lewis and Clark, by delivering to and leaving with said Albion McDonald, at the time and place aforesaid, a true copy of the same, and exhibiting to him the original, and I further certify that the said Albion McDonald thereupon acknowledged to me that he is the person referred to in the said citation.

Dated this 2d day of May, 1908, at Helena, Montana.

ARTHUR W. MERRIFIELD,
U. S. Marshal for the District of Montana,
By HARRY DRUMM, *Deputy.*

Service.....	2.00
Expenses.....	3.40
	<hr/>
	5.40

(Endorsed:) In the U. S. Circuit Court, Ninth Circuit, District of Montana. John Trodick, Complainant, *vs.* Northern Pacific Railway Company *et al.*, Defendants. Alias Citation on Appeal. Docketed C. C. A. No. 1563. U. S. Circuit Court of Appeals, 9th Circuit. Filed May 20, 1908. F. D. Monekton, Clerk U. S. Circuit Court of Appeals, 9th Circuit. Walsh & Nolan, Helena, Mont. Solicitors for *Defendants.*

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1563.

JOHN TRODICK, Appellant,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and
ALEXON McDONALD and AGNES AUCHARD, as Administratrix with
the Will Annexed of David Auchard, Deceased, Appellees.

Opinion U. S. Circuit Court of Appeals.

Upon Appeal from the United States Circuit Court for the District
of Montana.

Before Gilbert, Ross, and Morrow, Circuit Judges.

Ross, *Circuit Judge*, delivered the opinion of the Court:

This suit was brought by the appellant in the Court below to obtain a decree requiring the conveyance to him of the title to the southeast quarter of section 35, township 15 north, range 4 west, Helena Land District, of the State of Montana, conveyed by the Government patent issued January 10, 1903, to the appellee, The Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, the beneficiary of the grant made to it by the Act of Congress of July 2, 1864 (13 Stats. at Large 365).

The case shows that the tract in controversy is within the primary limits of that grant to the Northern Pacific Railroad Company, the map of the definite location of the line of which road was filed July 6, 1882. At that time the land in controversy was unsurveyed. It was not surveyed until the year 1891, the plats of the survey thereof being filed in the local land office on the 10th day of August of that year; September 21, 1892, it was listed to the railroad company. The record further shows that one Martin Lemline established his residence on this tract of unsurveyed government land, with his family, in 1877, made improvements thereon of the value of about one thousand dollars, and continued to reside upon the land until his death, during the year 1891. In holding that such settlement did not except the land from the operation of the grant to the railroad company, the Commissioner of the General Land office expressly found the facts to be as above stated, and further, in communicating his decision to the local land office, said:

"It is undoubtedly true that the land was occupied by Mr. Lemline when the right of the company attached, that he was qualified to make entry of the same and settled there with the intention of doing so, as the circumstances indicate. Had he lived until the plat of survey was filed in your office, he or his wife would, without doubt,

have been allowed to perfect the claim by them initiated prior to July 6, 1882. Since Mr. Lemline had no claim of record, and the claim of Trodriek had its inception subsequent to the definite location of the road, it must be held that the land inured to the grant. (*N. P. R. Co. v. Colburn*, 164 U. S. 537.)"

The case further shows that just before his death Lemline sold the improvements to the appellant Trodriek, who thereupon took possession of the land with the intention of acquiring the title thereto from the Government, but that Trodriek did not apply to enter it as a homestead until January 10, 1896, which application on his part, being refused by the local land office, resulted in an appeal to the Commissioner of the General Land Office, and in his adverse decision already referred to. The court below, in dismissing the bill, as it did, referred to the Act of Congress of May 14, 1880 (21 U. S. Statutes at Large, 140), by which the settler upon public unsurveyed lands, with the intention to claim under the homestead law, was allowed the same time to file his homestead application and to perfect his original entry in the United States land office, as was allowed a pre-emption settler to put his claim on record, and by which it was provided that such homesteader's right should relate back to the date of his settlement, the same as if he settled under the pre-emption laws. "This," said the court below, "would have given Lemline, had he lived, ninety days after the filing of the township plat (August 10, 1891), within which time he was obliged to put his application for entry on file, so as to become of record. He had sold, however, to Trodriek in 1889, so that the very best possible position that may be conceded to Trodriek is such as Lemline could have occupied, if he had not sold, and had lived until after the plats of survey were filed. But even upon such a concession, it became his duty, as it would have been Lemline's duty, to file his application for homestead within ninety days after the filing of the township plat in 1891. He failed to do so, though, and by his omission he lost his rights to enter the land under the homestead laws. The case is therefore one where the occupant, having failed to take the necessary steps to file his application until long after the survey and filing, the land passed to the railroad grant, and no claim of ownership can be made at this time. As I read the case of *Nelson vs. Northern Pacific Ry. Co.*, 188 U. S., 109, and *Oregon and California R. R. Company vs. United States*, 189 U. S. 103, and the cases therein cited, they sustain these views."

We are unable to agree with the trial court in this respect. The land in question being within the primary limits of the railroad grant, whether or not the title thereto passed to that company depended upon the status of the land at the time of the filing of the map of the definite location of the road, which was July 6, 1882. This is the well established law upon the subject, as is shown by the cases referred to in *Nelson v. Northern Pacific Ry. Co.*, 188 U. S., from and including page 116 to and including page 132. The case of *Nelson v. Northern Pacific Ry. Company* is, in our opinion, pre-

cisely similar to the case we have here. The land grant act is the same in both cases. In both the land in controversy fell within the primary limits of that grant, was unsurveyed at the time of the filing of the map of definite location of the road, and there Nelson, as Lemline here, was on that day in possession of the land, with his improvements, having years before entered into its possession with a *bona fide* intention of acquiring title thereto under the homestead laws. In the Nelson case the Supreme Court distinctly adjudged that the Northern Pacific Railroad Company acquired no vested interest to any land under its grant of July 2, 1864, prior to the filing of the map of the definite location of its road, and that all lands which were then "occupied by homestead settlers" with the *bona fide* intention to acquire the same under the homestead laws were expressly excluded therefrom (188 U. S. 116, and cases there cited). On page 133 of its opinion, the court said:

"Nelson's occupancy occurred after the passage of the act of 1880 (that is to say the act of May 14, 1880, Vol. 21 U. S. Stat. at Large, 140, already referred to). While that act did not apply to a railroad company which had acquired the legal title, by the definite location of its road, it distinctly recognized the right prior to such time to settle upon the public lands, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws. In occupying the land here in dispute Nelson did not infringe upon any *vested* right of the railroad company; for there had not been at the date of such occupancy in 1881 any definite location of the line of the railroad, and the land, so occupied, with other lands embraced by the map of *general* route, constituted only a 'float,' the company having, at most, only an inchoate interest in them, a right to acquire them, *if, at the time of definite location*, it was not 'occupied by homestead settlers' nor incumbered with 'other claims or rights.' The withdrawal merely from 'sale or entry' in 1873, based only on a map of the general route of the road, did not identify any specific sections, was not expressly directed or required by the act of 1864, was made only out of abundant caution and in accordance with a practice in the Land Department, and did not and could not affect any rights given to homestead occupants by Congress in the acts of 1864 and 1880. Besides, the order made in 1873 to withhold from *sale or entry* all the odd-numbered sections falling within the limits of the general route was without practical value so far as the land in dispute was concerned; for such land had not been surveyed, and there could not have been any sale or entry of unsurveyed lands. At any rate, the order of withdrawal directing the local land office to withhold from 'sale or entry' the odd-numbered sections within the limits of the *general* route could not prevent the *occupancy* of one of those sections prior to definite location by one who in good faith intended to claim the benefit of the homestead law; this, because such right of occupancy was distinctly recognized by the act of 1864. But if this were not so, the act of 1880, in its application to public lands, which have not become already vested

in some company or person, must be held to have *so modified the order of withdrawal based merely on general route, that such order would not affect any occupancy or settlement made in good faith, as in the case of Nelson, after the passage of that act, and prior to definite location.* This conclusion cannot be doubted, because the act of 1880 made no exception of public lands covered by orders of withdrawal from sale or entry based merely on general route, and because also public lands, which had not become vested in the railroad company, by the definite location of its line, were subject to the power of Congress."

The circumstance that in the Nelson case Nelson filed upon the land claimed by him as soon as it was surveyed and the plat thereof returned to the land office, was a circumstance which does not exist in the present one for the reason that the land was still unsurveyed at the time of Lemline's death; which circumstance, however, was not at all vital to the decision in the case of Nelson *vs* Northern Pacific Railway Company, which, as has been seen, was based solely upon the fact that at the time of the filing of the map of definite location of the road the land in question was in the possession of and improved by Nelson with the *bona fide* intention on his part to acquire title thereto under the homestead laws.

The Commissioner of the General Land Office, as has been seen, based his ruling that the land here in controversy inured to the railroad company under its grant, upon the decision in Northern Pacific Railroad Co. *vs* Colburn, 164 U. S., 537, which case is clearly distinguishable from the present one by the fact that in that case the land was surveyed prior to the filing of the map of definite location by the railroad company, and notwithstanding such survey the occupant had not manifested the good faith of his occupation by entering or attempting to enter the land under the law. And this clear distinction was distinctly pointed out by the Supreme Court in the case of Nelson *vs* Northern Pacific Railway Company at page 132 of its opinion, where it said:

"Nor is there any conflict between the decision now rendered and Northern Pacific Railroad *v* Colburn, 164 U. S. 383; for, as appears from the opinion and record in that case, the land there claimed to have been occupied by a homestead settler, at the date of definite location, was *surveyed* public land, and the good faith of the occupation was not manifested by an entry, or an attempt at entry, at any time in the local land office. It was held that the inchoate right of the homesteader must be initiated by a filing in the land office. In the present case, as we have seen, the land occupied was unsurveyed, and at the time of such occupancy, the land being unsurveyed, there could not then have been any filing or entry in the land office."

See also in the same connection, Northern Pacific Ry. Co. *vs* McCormick, 94 Fed. 932.

For the reasons stated, we think it clear that the piece of land here in controversy was not embraced by the railroad company's grant and that the patent was issued by the government to the com-

pany because of the erroneous view of the law taken by the Commissioner of the land office.

The only other question requiring special notice is whether the appellant is entitled to a conveyance of the title thus passed by the patent. The record shows that, during his last illness in 1891, Lemline sold his improvements upon the land to Trodick for a valuable consideration, and that the latter thereupon went into possession of the premises and continued to reside there, but did not apply to enter the land as a homestead until January 10, 1896, which application the land office refused solely because it held, as has been seen, that the land passed to the railroad company by virtue of its grant. And the court below based its ruling against appellant upon the ground that he did not file his application under the homestead law within ninety days after the filing of the township plat of August 10, 1891. But such delay on the part of the homesteader did not forfeit his right except as against some one who had himself acquired or initiated a right. As has been seen, the requirement in respect to filing an application within ninety days after the return of the plat is, by the statute already referred to, applicable alike to pre-emption and homestead claims. In the case of *Landsdale vs. Daniels*, 100 U. S. 113, each party claimed under the Act of March 3, 1853, (10 Stats. 244), from which it appeared that unsurveyed, as well as surveyed lands not exempted by the same Act, were subject to the pre-emption laws, with all the exceptions, conditions and limitations expressed in such, unless otherwise expressed or provided, and, among other things, that where unsurveyed lands were claimed the usual notice of such claim should be filed within three months after the return of the plats of surveys to the land office. The land there in controversy being unsurveyed, the plaintiff made entry and settlement thereof November 1, 1853, and the defendant made entry and settlement on the same quarter section February 22, 1854. The precise date of the survey did not appear, but it did appear that the plats of the survey were returned into the local land office April 26, 1856, prior to which time, to-wit, February 20, 1856, the defendant had filed his notice of claim or declaratory statement. Congress had provided that, where unsurveyed lands in the state in which the land in controversy was situated were claimed by pre-emption, the usual notice of such claim should be filed within three months after the return of plats of surveys to the land officer, and proof and payment should be made prior to the day appointed by the President's proclamation for the commencement of the sale of such lands. Declaratory statements under the original act might be made within three months after the return of the plats of surveys to the local land offices, which was effectual as a step to secure the right of it was within one year from the passage of the act, which last provision was amended by a subsequent act and extended to settlements made prior to and within two years after the passage of the amendatory act (12 Stats. 410). The defendant's declaratory statement having been made prior to the return of the plats of sur-

veys instead of after, as required by the statute, was held by the court to be unauthorized and void. Still the defendant insisted that he was entitled to the patent to the land because the plaintiff did not file his declaratory statement until more than two years after the plats of the surveys of the land were returned into the local land offices instead of within three months, as required by the statute. The Supreme Court thus answered that contention:

"Grant that, but it only shows that both parties settled upon the land while it was unsurveyed, and that each was to some extent in fault in filing his declaratory statement, the difference being that the defendant filed his before he had any right to file it under the pre-emption act, which rendered it a nullity, and that the plaintiff did not file the required notice of claim until the time allowed by the amendatory act had expired. Such a notice, if given before the time allowed by law, is a nullity; but the rule is otherwise where it is filed subsequent to the period prescribed by the amendatory act, as in the latter event it is held to be operative and sufficient unless some other person had previously commenced a settlement and given the required notice of claim. *Johnson v. Towsley*, 13 Wall, 72, 91. Tested by that rule, it is clear that the equity of the plaintiff is superior to that of the defendant, as the latter never filed any other notice of claim than that which preceded the return of the plats of survey into the local land-offices."

In the case of *Whitney vs. Taylor*, 158 U. S. 85, 93, 96, the Supreme Court, having considered, among other things, the objection made that a claim made under the Act of 1853 was not filed within three months after the return of the plats of surveys to the land offices, said:

"With reference to the second matter, it is true that section 6 of the act of 1853 (10 Stat. 246) provides 'that where unsurveyed lands are claimed by pre-emption, the usual notice of such claim shall be filed within three months after the return of the plats of surveys to the land offices.' But it was held in *Johnson v. Towsley*, *supra*, that a failure to file within the prescribed time did not vitiate the proceeding, neither could the delay be taken advantage of by one who had acquired no rights prior to the filing. As said in the opinion in that case (p. 90): 'If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before any one else has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right.' See also *Landsdale v.*

Daniels, 100 U. S. 113, 117"—and the court proceeds to quote from the last mentioned case the portion of the opinion hereinbefore set out.

The case of *Landsdale vs. Daniels* also answers an objection made to the validity of the sale by Lemline to Trodick of his improvements upon the land here in controversy. In *Landsdale v. Daniels* objection was made to the plaintiff's claim to the land on the ground that, instead of erecting a dwelling house on the land claimed by him, he purchased the dwelling house already there, in answer to which the court said:

"His entry and occupancy of the tract are admitted; and the court is of the opinion that it is immaterial whether he built the dwelling house himself or hired an agent to erect it for him, or whether he purchased it after it was built by another, provided it appears that he was the lawful owner of the dwelling-house, and made the entry and settlement in good faith, and continued to occupy and cultivate the land, as required by the pre-emption laws. Enough appears to show that the dwelling-house was there on the land, and that it was owned, possessed, and occupied by the plaintiff as his home more than three months before the defendant entered and attempted to make his settlement." See also *Bishop of Nesqually v. Gibbon*, 158 U. S. 155, *Lamb v. Davenport*, 18 Wall. 307.

A suggestion is made on the part of the appellees that the status of the land is to be determined solely by the condition of the records of the land office at the time of the filing of the map of the definite location of the company's road, and that if it be permissible to prove by parol the fact of settlement, improvement and residence upon the land in question by the homestead claimant, the railroad company might be deprived of a large part of its grant. Settlement, improvement and residence are physical facts easily susceptible of proof, and good faith on the part of the claimant is exacted by the land department, as well as by the courts of justice. There is no more danger of their being erroneously decided in cases like the present than in any other case that comes before a court or tribunal, depending for its decision upon facts. To a somewhat similar argument, the Supreme Court, in the case of *Whitney v. Taylor*, *supra*, (158 U. S. 95, 96) said:

"Counsel urges that, inasmuch as the latter (a declaratory statement) need not be verified, one might file under assumed names declaratory statements on every tract within the limits of a railroad grant prior to the time of the filing of the map of definite location, and thus prevent the railroad company from receiving any lands. This danger is more imaginary than real. In the first place, for each application fees must be paid, and it is not to be supposed that any one would throw away money for the mere sake of preventing a railroad grant from having any operation. In the second place, such declaratory statements under assumed names would be purely fictitious and could be set aside as absolutely void. Indeed, good faith is presumed to underlie all such applications. The acceptance

of the declaratory statement by the local land officers is *prima facie* evidence that they have approved it as a *bona fide* application, and if, in any particular instance, it is shown to be purely fictitious, doubtless there is an adequate remedy by proper proceedings in the land office. There is in the case before us no pretence that the transaction was a fictitious one, or carried on otherwise than in perfect good faith on the part of the applicant. At any rate, Congress has seen fit not to require an affidavit to a declaratory statement, and has provided for the filing of such unsworn statement as the proper means for an assertion on record of a claim under the pre-emption law, and that is all that is necessary to except the land from the scope of the grant."

When the grant of July 2, 1864, was made to the Northern Pacific Railroad Company, substantially the entire country between Lake Superior and Puget Sound was, as said by the Supreme Court in *Nelson vs. Northern Pacific Railway*, *supra*, "untraveled as well as uninhabited except by Indians, very few of whom, at that time, were friendly to the United States. The principal object of the grant, as will appear from its language, was to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, by means of a railroad and telegraph, and to that end and in order to bring the public lands into market it was deemed important to encourage the settlement of the country along the proposed route. The public lands in that vast region were unsurveyed, and it was not known when they would be surveyed. Congress, of course, knew that if immigrants accepted the invitation of the Government to establish homes upon the unsurveyed public lands, they would do so in the belief that the lands would be surveyed, that their occupancy would be respected, and that they would be given an opportunity to perfect their titles in accordance with the homestead laws"; in which case, as has been seen, the Supreme Court distinctly held that the settlement, improvements and possession by Nelson, of the land there in controversy, with a *bona fide* intention to acquire the Government title thereto under the homestead laws, at the time the map of the definite location of the line of the Northern Pacific Railroad Company was filed, excepted the land so claimed from the grant—such land then being unsurveyed, for which reason there could not then have possibly been any record in the land office of the homesteader's claim.

The judgment is reversed and the case remanded to the court below, with directions to give judgment for the complainant.

(Endorsed:) Opinion. Filed November 5, 1908. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1563.

JOHN TRODICK, Appellant,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and
ALBION McDONALD, and AGNES AUCHARD, as Administratrix
with the Will Annexed of David Auchard, Deceased, Appellees.

Dissenting Opinion U. S. Circuit Court of Appeals.

Appeal from the United States Circuit Court for the District of
Montana.

MORROW, *Circuit Judge*, dissenting:

In my opinion the question involved in this case has been clearly and distinctly decided by the Supreme Court of the United States in a number of cases. When the controversy between the land grant railroad companies and the settlers first arose with respect to lands within the place limits of the grant, it involved two questions, first, did the right of the railroad company at which the old numbered sections described in the grant upon the fixing of the *general route* of the line of road, or upon the filing of the map of *definite location* of the line of road in the land office, second, did the right of the pre-emption or homestead settler attach upon the settlement upon the land or upon his entry of the land in the land office. With respect to these two questions the law was declared to be that the opposing rights of the railroad company and an individual entryman were to be determined, not by the fixing of the general route of the road by the railroad company or the mere occupation of the land by the pre-emption or homestead settler, but by the *state of the record in the land office*. On the part of the railroad company, its right did not attach to the lands within the place limits of the grant until it had *definitely located* the line of its road, as shown by the accepted map of its line of road *filed in the land office*, and on the part of the pre-emption or homestead settler, his right did not attach until he had made an *entry of the land in the land office*. Whichever of these acts was first in point of time was first in right. This was the state of the law until May 14, 1880 (21 Stats. 141) when Congress passed the act providing that a homestead settler on unsurveyed land should be allowed the same time to file his homestead application and to perfect his original entry in the land office as was then allowed to a pre-emption settler. This was a period of three months from the date of the receipt at the district land office of the approved plat of the township embracing the settlement. Under this act the settler on unsurveyed land had for the first time the right to enter

land and have the entry relate back to the date of settlement, but such right was only acquired by complying with the statute.

In *Kansas Pacific Railway Company v. Dunnmeyer*, 113 U. S. 629, 640, the homestead entry was made July 25, 1866. The line of the definite location of the company's road was filed with the commissioner of the General Land Office at Washington September 21, 1866. Referring to the filing of the map of definite location of the road, the Court said:

"When the line was fixed, which we have already said was by the act of filing this map of definite location in the General Land Office, then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten odd sections on each side of that line where the surveys had then been made. Where they had not been made, this determination was only postponed until the survey should have been made. This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved, or a homestead or *pre-emption claim* had attached to any of them."

Again on page 641 the Court said:

"It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations. The reasonable purpose of the government undoubtedly is that which it expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant."

And again on page 644:

"Of all the words in the English language, this word *attached* was probably the best that could have been used. *It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated.* It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land it was excepted

out of the grant as much as if in a deed, it had been excluded from the conveyance by metes and bounds."

In *Maddox v. Burnham*, 156 U. S. 544, 546, the settler, Maddox, had gone upon the land in October, 1856, but made no attempt to enter it as a homestead until the succeeding spring, and after the withdrawals in favor of the railroad company had been ordered by the Secretary of the Interior. It appeared, however, that after Maddox and his father-in-law had gone upon the land the latter went to the land office for Maddox and himself to get permission from the register of the land office to go upon the land, put up houses and live in them until the following spring, when they would enter the land as homesteads. The register gave the permission and under this permission they occupied the lands and made improvements, and when they went in the succeeding spring for the purpose of making their homestead entries they were told that the land had been withdrawn. Upon these facts the settler insisted that his equitable rights in occupying the land and placing improvements thereon antedated the withdrawals and were superior to the legal title. In denying these alleged equitable rights the Supreme Court said:

"This claim of the defendant cannot be sustained. At the time of these transactions *the mere occupation of land with a purpose at some subsequent time of entering it for a homestead gave to the party so entering no rights.* The law in force (12 Stat. 392, c. 75) made the entry at the land office the initial fact. Sec. 1 authorized any one possessed of the prescribed qualifications 'to enter one quarter section, or a less quantity, of unappropriated public lands.' Sec. 2 provided that the person applying should, upon his application, make affidavit, among other things, 'that such application is made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation, * * * and upon filing the said affidavit with the register or receiver, and on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of lands specified.' So the law stood until May 14, 1880, 21 Stat. 141, c. 89, when an act was passed, the third section of which is as follows:

"Sec. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office, as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

The Court, in referring to the settler's occupation of the land said:

"It is true that he claims that he had permission from the register of the land office to go upon the land and occupy it, but the register had no power to give such permission; he had no general control over

the unappropriated public lands; he could vest no rights, legal or equitable, in any individual other than such as are authorized by statute. His authority was limited to receiving and acting upon applications for homestead or pre-emption entry, and it cannot be that any such unauthorized permission of a local land officer can create a right not given by the statute, or defeat a title conveyed by the government in full compliance with the law."

In *Tarpey v. Madsen*, 178 U. S. 215, 222, the subject was again reviewed by the Supreme Court and it was held that the opposing rights of an individual entryman to the railroad company *were to be determined by the state of the record in the land office*. Whether the Court intended to say that the Act of May 14, 1880, to which reference was made, applied only to a controversy between individual occupants of the land and not to a controversy between an individual entryman and the railroad company, is immaterial in this case in view of later decisions. What the Court said was this:

"It is undoubtedly true that one occupying land with a view of preemption is given thirty days within which to file with the register of the land office his declaratory statement. Rev. Stat. Sec. 2264 and since 1880 the same right has been possessed by one desiring to make a homestead entry. Act of May 14, 1880, 21 Stat. c. 89, sec. 3. So that any controversy between two occupants of a tract open to pre-emption and homestead entry is not determined by the mere time of the filing of the respective claims in the land office, but by the fact of prior occupancy, and these controversies are of frequent cognizance. Oral evidence, therefore, of the date of occupancy may be decisive of the controversy between such individual applicants for a tract of public land, *but by decisions of this court, running back to 1882, as between a railroad company holding a land grant and an individual entryman the question of right has been declared to rest not on the mere matter of occupancy, but upon the state of the record.*"

Again on page 227 the Court said:

"And surely Congress in making a grant to a railroad company intended that it should be of present force, and of force with reasonable certainty. It meant a substantial present donation of something which the railroad company could at once use, and use with knowledge of that which it had received. It cannot be supposed that Congress contemplated that, as in this case, a score of years after the line of definite location had been fixed and made a matter of record, some one should take possession of a tract apparently granted, and defeat the company's record title by oral testimony, that at the time of the filing of the map of definite location there was an actual though departed occupant of the tract, and therefore that the title to it never passed."

In *Northern Pacific Railroad Company v. Colburn*, 164 U. S. 383 it was distinctly held that mere occupation of land by a homestead settler unaccompanied by a filing of the claim in the land

office did not exclude a tract from the operation of the grant to the railroad company. It is true that the land there claimed to have been occupied by the homestead settler at the time of the definite location of the line of the railroad, was surveyed public land. In the present case the land was unsurveyed, but under the Act of May 14, 1880 (21 Stats. 140) and Section 2266 of the Revised Statutes, the homestead settler was allowed three months after the receipt of the plat of survey at the district land office, to file his homestead application. If he filed this application within this time it was provided that "his right should relate back to the date of the settlement, the same as if he settled under the pre-emption laws." It was only upon complying with this statute that the previous occupation of unsurveyed land by the homestead settler was recognized as "a claim". If he failed to comply with the statute, his occupation of the land at the time of the definite location of the line of road was precisely the same as though the land had been surveyed at the time of such location and he had failed to make his claim of record in the land office at that time. The land would not be excluded from the grant. In this case, in referring to the decision of the Supreme Court of Montana, the Court said:

"And if it be true, as matter of law, that mere occupation or cultivation of the premises at the time of the filing of the map of definite location, unaccompanied by any filing of a claim in the land office then or thereafter, excludes the tract from the operation of the land grant, the decision of the Supreme Court of Montana was right. But frequent decisions of this court have been to the effect that *no pre-emption or homestead claim attaches to a tract until an entry in the local land office.*"

The decision in the case of *Nelson v. The Northern Pacific Railroad Company*, 188 U. S. 108, is not in conflict with these prior decisions. The railroad grant under consideration in that case was the same as in the present case. The railroad company had fixed the *general route* of its road extending coterminous with the land in controversy and within forty miles thereof by filing a plat of such route with the commissioner of the general land office on August 20, 1873. It had also *definitely located* the line of its railroad coterminous with and within less than forty miles of the land on December 6, 1884. Three years prior to the latter date Nelson, who was then conceded to have been qualified to enter public lands under the homestead act, went upon and occupied the land in controversy and continued to reside thereon. The land was not surveyed until 1893, but as soon as it was surveyed he attempted to enter it under the homestead laws of the United States. His application was rejected solely because, in the judgment of the local land office, it conflicted with the grant to the Northern Pacific Railroad Company. The opinion of the Court, by Mr. Justice Harlan, reviews previous decisions of the Supreme Court and the Department of the interior for the purpose of determining whether the railroad

company acquired a vested interest in the land upon the fixing of the *general route* of the road opposite the land in controversy on August 20, 1873 or when the line of the road was *definitely located* on December 6, 1884. From this review, the Court reached the conclusion that the railroad company acquired no vested interest in any particular section of land until after the *definite location* of the line of its road had been made, as shown by the accepted map of its line filed in the land office on December 6, 1884. Three years prior to the latter date, as before stated, Nelson had gone upon and occupied the land as a homestead settler, and the Court was of opinion that "His continuous occupancy of it, with a view, in good faith, to acquire it under the homestead laws *as soon as it was surveyed*, constituted * * * a *claim* upon the land within the meaning of the Northern Pacific act of 1864." In another place the Court says: "He (Nelson) acted with as much promptness as was possible under the circumstances." Again: "The settler waited from 1881 to 1893 for the land to be surveyed, and as soon as that was done he attempted to enter it under the homestead law in the proper office." The Court, referring to the provisions of the Act of May 14, 1880, says:

"Nelson settled on unsurveyed public land, in which the railroad company had no vested or specific interest and the third section of the Act of 1880 was purposeless if it did not allow him to perfect his title under the homestead laws, *as soon as the land was surveyed.*"

The last five words of this quotation are italicized by the Court to emphasize the fact that Nelson had his claim of a homestead *on record in the land office* in accordance with the provisions of the Act of 1880, thus making the *entry* relate back to the occupation of the land by him and giving him a right prior to the definite location of the road.

At the same term of the court at which the Nelson case was decided the Supreme Court decided the case of Oregon and California Railroad Company v. United States, 189 U. S. 103. The opinion of the Court was also by Mr. Justice Harlan. The controversy in that case involved the construction of the grant to the California and Oregon Railroad Company (14 Stats. L. 239) the terms of which, so far as the present question is concerned, are substantially the same as those of the Northern Pacific Railroad grant. In that case, as in the Nelson case, the railroad company had received patents from the United States under its grant to the lands in dispute. That case involved lands within the indemnity limits of the railroad grant. The lands had been occupied for a number of years previous to the completion of the survey, by the homestead settlers. Immediately upon the completion of the survey, and before any claims by the homestead settlers had been filed, the railroad company selected the lands as part of its grant. After such location, but within the ninety days allowed by the Act of May 14, 1880, applications to enter the lands as homesteads were made by the occupants of the lands. The Court held that the rights of the occupants under the circumstances

were superior to those of the railroad company, on the ground that after the lands had been surveyed the settler had promptly taken the necessary steps to protect his rights under the homestead laws. The Court says:

"But it is contended that as the selection by the company * * * was prior to the application by the respective settlers for entry under the homestead laws, its right to the lands in question was superior to that asserted by the settlers. This view is completely met by the fact that the settler, by prior occupancy in good faith, could avail himself of the homestead acts whenever, by an official survey, the way is opened by the Government for him to do so, and by the fact that, within ninety days after these lands were surveyed, he filed in the proper office his application to enter them under the homestead laws of the United States. He moved with due diligence to protect and perfect the right acquired by his occupancy of the land with the intention to avail himself of the benefit of those laws. That right was not to be affected or impaired by the fact that the lands were not surveyed at the date of occupancy. *Nelson v. Northern Pacific Railway*, above cited; *Ard v. Brandon*, 156 U. S. 537, 543; *Tarpey v. Madsen*, 178 U. S. 215, 219. * * * In the *Tarpey* case it was said that "the right of one who has actually occupied (public lands), with an intent to make a homestead or pre-emption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent;" that if a settler was in possession before definite location, "with a view of entering it as a homestead or pre-emption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights." So, if the condition of the lands, being unsurveyed, prevents the making by a *bona fide* occupant of a proper application of record to enter them under the homestead laws his rights will not be lost, *if, after the lands are surveyed, he applied in due time to enter the lands under those laws.* And such has been held to be the object and effect of the act of May 14, 1880, c. 89, 21 Stat. 140."

The contention of the appellant that the opinion of the Supreme Court in these cases must be construed in the light of the opinion of the Court in the case of *Northern Pacific Railroad Company v. Sanders*, 165 U. S. 620 may be admitted, but such a construction does not change the law with respect to the question now under consideration. In the *Sanders* case the Northern Pacific Railroad Company brought suit to recover possession of an odd-numbered section within the primary limits of its grant. Prior to the definite location of the line of its railroad opposite to and past the section of land in dispute certain persons qualified to enter mineral lands under the laws of the United States entered upon the land in controversy and filed upon it as mineral land, applying for patents therefor and conforming in all respects to the provisions of the laws of the United States relating to "mineral lands and mining resources." Applica-

tions for these lands as mineral lands were *pending in the land office undetermined* at the time the railroad company filed its map of definite location. The defendants, who subsequently entered into the possession of the lands, did not assert title in themselves at the time of the definite location of the line of railroad, but resisted the claim of the railroad company upon the ground that the lands were excluded from its grant by reason of the fact that there were *claims to the lands pending in the land office* at the time of the definite location of the road. The claims consisted, as stated, in the application of certain persons to purchase the lands as mineral lands. The lands were not in fact mineral lands and it does not appear what became of the applications. The Court, in commenting upon this feature of the case, said:

"As the lands in question were not free from those claims at the time the plaintiff definitely located its line of road, it is of no consequence what disposition was or has been made of the claims subsequent to that date."

The Court accordingly held that the lands did not pass to the railroad company by the terms of the grant, for the reason that *claims to the land were pending in the land office* at the time of the definite location of the road. The distinction to be drawn between that case and the one at bar is the fact that in the former case the applications to purchase the land as mineral land were on file and pending in the land office undetermined when the line of definite location of the road was fixed, while in the present case no such application was pending, nor, under the law, was it permissible for the homestead settler to make application for a homestead upon unsurveyed land. As said by the Secretary of the Interior in *Southern Pacific Railroad (Branch) v. Lopez*, 3 L. D. 130, 131, cited as authority in *Nelson v. Northern Pacific Railway Company*, *supra*:

"Under the homestead law it is the 'entry' which reserves land (except for the short period during which it is reserved by settlement under the act of May 14, 1880,) and not any occupation by the claimant before or after it."

In *Sturr v. Beck*, 133 U. S. 541, 547, decided in 1890, the Supreme Court held that: "A claim of the homestead settler * * * is initiated by an entry of the land, which is effected by making an application at the proper land office, filing the affidavit and paying the amounts required by sections 2238 and 2290 of the Revised Statutes."

It appears that on July 6, 1882, the Northern Pacific Railroad Company filed with the General Land Office its map of definite location of the line of said railroad, coterminous with and within less than forty miles of the land in controversy. One Martin Lamlein settled upon the land in the year 1877 and continued to reside thereon until his death in August, 1889. During this time the land was unsurveyed and, therefore, not open to entry as a homestead. Preceding Lamlein's death the appellant succeeded to Lamlein's possessory right by purchase or an agreement to purchase the improve-

ments on the land. The appellant has since continued to reside upon the land. The land was surveyed in 1891 and the township plat of the survey embracing it was filed in the land office August 10, 1891. No attempt was made to enter the land by anyone until June 29, 1893, when the appellant applied to make a homestead entry. There was, therefore, *no entry of record in the land office* at the time of the definite location of the line of the railroad and no entry was made within three months from the date of the receipt at the district land office of the approved plat of survey of the township embracing the land, under the provisions of the Act of May 14, 1880. The land was, therefore, free from any homestead claim or right, and the title passed to the railroad company under the grant.

It is contended further by appellees that Lamlein was not a qualified entryman and that his occupation of the land at the time of the definite location of the line of railroad did not exclude it from the grant of the railroad company for the following reasons:

(1) It is not shown that Lamlein was a citizen of the United States;

(2) It is not shown that Lamlein was not the proprietor of more than 160 acres of land in any state or territory of the United States;

(3) It appears from the evidence that prior to Lamlein's death he had sold or agreed to sell whatever right he had to the land to the appellant.

It is contended that under Section 2290 of the Revised Statutes, as amended by the Act of March 3, 1891 (26 Statutes at Large, 1095) this act amounted to an abandonment of the land.

It would seem that either of these objections would be sufficient to defeat Lamlein's homestead claim.

In my opinion the decree of the Circuit Court should be affirmed.

(Endorsed:) Dissenting Opinion. Filed Nov. 5, 1908. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1563.

JOHN TRODICK, Appellant,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and
ALBION McDONALD and AGNES AUCHARD, as Administratrix
with the Will Annexed of David Auchard, Deceased, Appellees.

Decree U. S. Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the District
of Montana.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Montana and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs to the appellant, and the cause is remanded to the said Circuit Court, with directions to give judgment for the complainant.

(Endorsed:) Decree. Filed and Entered November 5, 1908.
F. D. Monekton, Clerk.

United States Circuit Court of Appeals, Ninth Circuit.

No. 1563.

JOHN TRODICK, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; ALBION McDONALD, and AGNES AUCHARD, as Administratrix with the Will Annexed of David Auchard, Deceased, Appellees.

The above mentioned appellees Northern Pacific Railway Company, Albion McDonald and Agnes Auchard, as Administratrix etc., respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a decree has therein been rendered on the fifth day of November, 1908, affirming the decree of the Circuit Court of the United States for the District of Montana, and that the matter in controversy in said suit exceeds One Thousand Dollars (\$1000.00) besides costs; that this cause is not one in which the United States Circuit Court of Appeals for the Ninth Circuit has final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, they pray that an appeal be allowed them in the above-entitled cause, and that the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit be directed to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed may be reviewed and, if error be found, corrected according to the laws and customs of the United States.

C. W. BUNN AND

CHARLES DONNELLY,

*Solicitors for Northern Pacific Railway Company,
Albion McDonald, and Agnes Auchard, as Ad-
ministratrix.*

And now, to-wit: on November 25, 1908, it is ordered that the above appeal be allowed as prayed for.

WM. B. GILBERT,

*Presiding Judge of the United States Circuit
Court of Appeals for the Ninth Circuit.*

(Endorsed:) Docketed. Original. U. S. Circuit Court of Appeals, Ninth Circuit. John Trodick, *vs.* Northern Pacific Ry. Co., Albion McDonald, and Agnes Auchard, as Adm'x with the will annexed of David Auchard, Deceased, Defendants. Application for Appeal. C. W. Bunn and Charles Donnelly, Attorneys for Defendant-, St. Paul, Minnesota. Filed Nov. 28, 1908. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, Ninth Circuit.

JOHN TRODICK Appellant,

vs.

NORTHERN PACIFIC RAILWAY CO. PANY, a Corporation; ALBION McDONALD, and AGNES AUCHARD, as Administratrix with the Will Annexed of David Auchard, Appellees.

Assignment of Errors.

Now come the above named appellees Northern Pacific Railway Company, Albion McDonald and Agnes Auchard, as Administratrix with the will annexed of David Auchard, Deceased, and present and file their assignment of errors, and say that the decree entered herein on the fifth day of November, 1908, is erroneous in this, to-wit:

I.

It was error in the court to render and enter its decree directing that judgment be given for complainant.

II.

It was error in the court to hold that the occupation of the land in controversy by Martin Lammlein operated to except said land from the land granted to the Northern Pacific Railroad Company by the Act of July 2, 1864.

III.

It was error in the court to hold that said Lammlein's occupancy of the land in controversy was an occupancy in good faith by a qualified entryman who intended to enter the land as soon as it should be surveyed.

IV.

It was error in the court not to hold and find that the sale by Lammlein of his squatter rights in the land in controversy establishes conclusively that his occupancy of said land was not in good faith with an intention to enter same when it should be surveyed.

V.

It was error in the court to hold that the land in controversy was excepted from the grant notwithstanding the fact that no application to enter said land had been made or was of record within ninety days after the completion of survey and the filing of township plat thereof, or for more than four years after the filing of such plat.

VI.

It was error in the court to hold that the complainant John Trodick possessed the necessary qualifications of a homestead entryman.

VII.

It was error in the court not to hold and find that the failure of said complainant John Trodick to show that he was not the owner of 160 acres of land, precluded his right to recover the land in controversy.

VIII.

It was error in the court not to hold that the complainant John Trodick by reason of his laches had lost his right to recover in a equitable action the land in controversy.

IX.

It was error in the court not to direct the affirmance of the decree appealed from.

Wherefore, the appellees above named pray that said decree may be reversed, and that they may have an adjudication and decree in their favor as herein specified.

C. W. BUNN AND
CHARLES DONNELLY,

*Solicitors for Northern Pacific Railway Company,
Albion McDonald, and Agnes Auchard, as Ad-
ministratrix.*

(Endorsed:) Docketed. Original. U. S. Circuit Court of Appeals, Ninth Circuit. John Trodick *vs.* Northern Pacific Ry. Co. Albion McDonald, and Agnes Auchard, as Adm'x with the will annexed of David Auchard, Deceased, Defendants. Assignment of Errors. C. W. Bunn and Charles Donnelly, Attorneys for Defendant. St. Paul, Minnesota. Filed Nov. 28, 1908. F. D. Monekton, Clerk.

United States Circuit Court of Appeals, Ninth Circuit.

JOHN TRODICK, Appellant,
vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; ALBION McDONALD, and AGNES AUCHARD, as Administratrix with the Will Annexed of David Auchard, Deceased, Appellees.

Know all-men by these presents, that we, the Northern Pacific Railway Company, a corporation organized and existing under the laws of the state of Wisconsin and the National Surety Company, a corporation organized and existing under the laws of the State of New York, are held and firmly bound unto John Trodick in the sum of Two Thousand Dollars (\$2000.00) to be paid to the said John Trodick for the payment of which well and truly to be made we bind ourselves and each of us, our successors and assigns, jointly and severally, firmly by these presents.

Scaled with our seals and dated this 20th day of November, A. D. 1908.

Whereas, the above named appellees have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the Circuit Court of Appeals of the United States for the Ninth Circuit, on the fifth day of November, 1908.

Now therefore, the condition of this obligation is such that if the above named appellees shall prosecute said appeal to effect, and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

NORTHERN PACIFIC RAILWAY
COMPANY,

By CHARLES DONNELLY,
Its Attorney in Fact.

DANIEL I. YORK.
H. W. EDGERTON.

[SEAL.]

NATIONAL SURETY COMPANY,
By W. C. McCURDY,
Its Attorney in Fact.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 20th day of November, 1908, before me personally appeared W. S. McCurdy, attorney in fact of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he is the attorney in fact of said corporation, the National Surety Company; that he knows the corporate seal; that it was affixed by order of the Board of Directors of said corporation, and that he signed said instrument as attorney in fact of

said corporation by the authority of said Board of Directors; and the said W. S. McCurdy acknowledged said instrument to be the free act and deed of said corporation.

D. I. YORK,
Notary Public, Ramsey Co., Minnesota.

My Commission expires Aug. 25, 1915.

Approved as a supersedeas.

WM. B. GILBERT,
*Presiding Judge of the United States Circuit
Court of Appeals for the Ninth Circuit.*

(Endorsed:) Docketed. Original. U. S. Circuit Court of Appeals, Ninth Circuit. John Trodick, *vs.* Northern Pacific Ry. Co., Albion McDonald, and Agnes Auchard, as Adm'x with the will annexed of David Auchard, Deceased, Defendants. Bond on Appeal. C. W. Bunn and Charles Donnelly, Attorneys for Defendant, St. Paul, Minnesota. Filed Nov. 28, 1908. F. D. Monekton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1563.

JOHN TRODICK, Appellant,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, ET AL.,
Appellees.

*Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings and
Transcript of Record on Appeal to the Supreme Court of the
United States.*

I, Frank D. Monekton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-four (44) pages, numbered from one (1) to forty-four (44), both inclusive, to be a true copy of the Assignment of Errors, and of all Proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the Opinion and Dissenting Opinion filed therein, as the same remain on file and of record in my office and that the same in connection with the preceding certified copy of the Printed Transcript of Record, and in connection with Plaintiff's Original Exhibit No. 1, (a blue print map or chart.) separately certified and accompanying this record, constitute a true copy of the entire record and the Transcript of Record on Appeal to the Supreme Court of the United States in the above-entitled case.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, this tenth day of December, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

United States Circuit Court of Appeals, Ninth Circuit.

UNITED STATES OF AMERICA:

To John Trodick, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, sixty days after date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein the Northern Pacific Railway Company, Albion McDonald and Agnes Auchard, as Administratrix with the will annexed of David Auchard, Deceased, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William B. Gilbert, Presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 25th day of November, A. D. 1908.

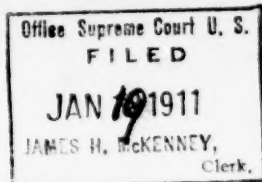
WM. B. GILBERT,
*Presiding Judge of the United States Circuit
Court of Appeals for the Ninth Circuit.*

Due service of the foregoing citation on appeal and receipt of copy thereof is hereby acknowledged this 28th day of November, A. D. 1908.

T. J. WALSH &
C. B. NOLAN,
Solicitors for John Trodick.

[Endorsed:] Docketed. Original. U. S. Circuit Court of Appeals, Ninth Circuit. John Trodick vs. Northern Pacific Ry. Co., Albion McDonald, and Agnes Auchard, as Adm'x with the will annexed of David Auchard, Deceased, Defendants. Citation. C. W. Bunn and Charles Donnelly, Attorneys for Defendant, St. Paul, Minnesota. Filed Dec. 2, 1908. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Endorsed on cover: File No. 21,452. U. S. circuit court appeals, 9th circuit. Term No. 656. Northern Pacific Railway Company, Albion McDonald, and Agnes Auchard, administratrix, etc., of David Auchard, deceased, appellants, vs. John Trodick. Filed December 19th, 1908. File No. 21,452.



Supreme Court of the United States

OCTOBER TERM, 1910.

No. 117.

NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES AUCHARD,
as Administratrix with the Will Annexed of
DAVID AUCHARD, Deceased,

Appellants,

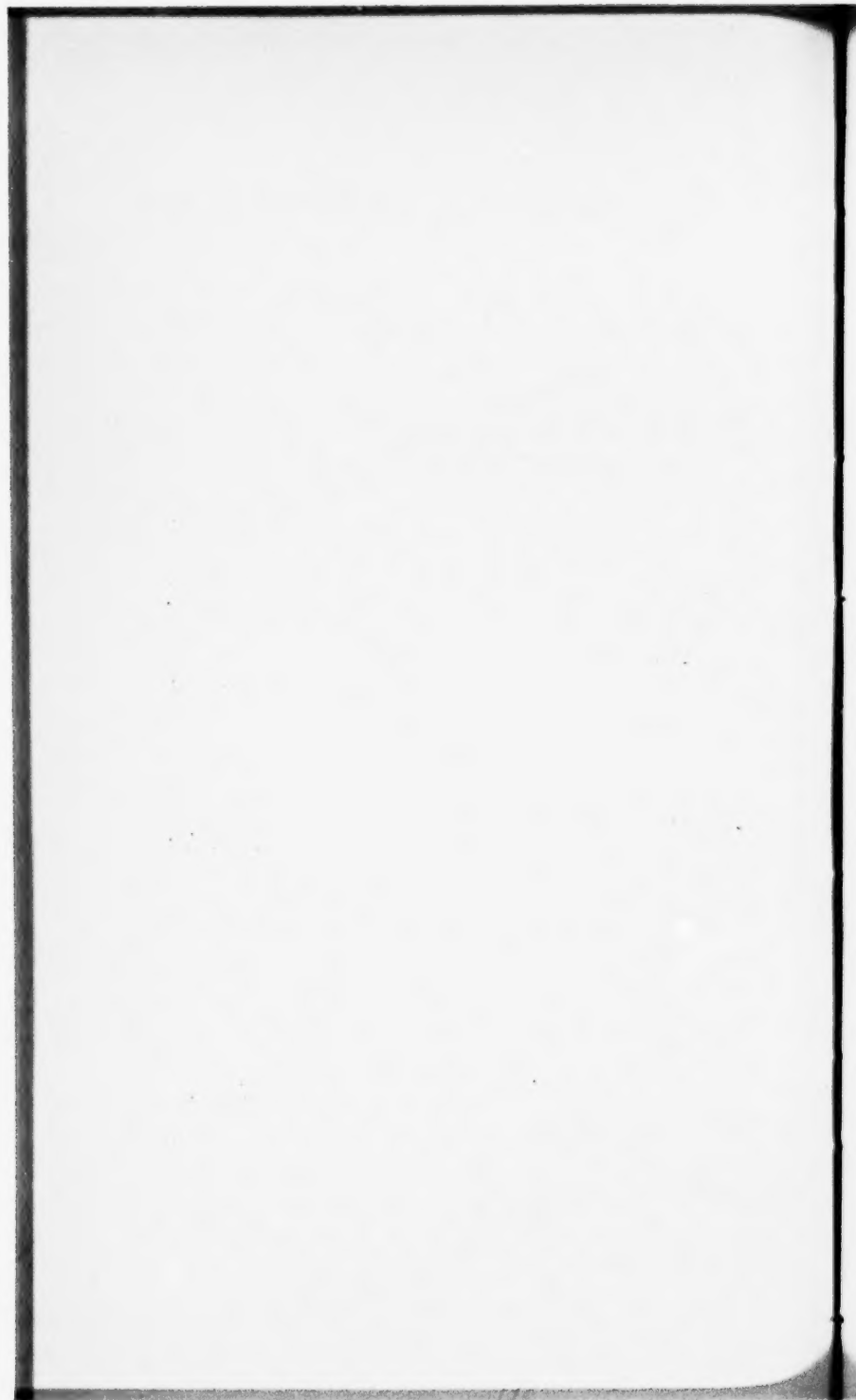
v.

JOHN TRODICK,

Appellee.

BRIEF FOR APPELLANTS.

CHARLES W. BUNN.
CHARLES DONNELLY.



Supreme Court of the United States

OCTOBER TERM, 1910.

No. 117.

NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES AUCHARD,
as Administratrix with the Will Annexed of
DAVID AUCHARD, Deceased,

Appellants,

v.

JOHN TRODICK,

Appellee.

STATEMENT OF FACTS.

This is an appeal from a decree of the Circuit Court of Appeals for the Ninth Circuit in a suit in equity brought by the appellee in the Circuit Court of the United States for the District of Montana. In that suit appellee sought to have it decreed that he was rightfully entitled, under the homestead laws, to the southeast quarter of section thirty-five, township fifteen north, range four west, in the state of Montana, and that the patent title given by the government to the Northern Pacific Railway Company and by that company transferred to its co-defendants should be held in trust for him. The Circuit Court, Judge Hunt sit-

ting, denied the relief sought and dismissed the bill. The Court of Appeals, in an opinion written by Judge Ross and concurred in by Judge Gilbert, reversed the decree of the Circuit Court, Judge Morrow dissenting. From the decree of reversal, this appeal is taken.

There is no dispute as to the facts and they are as follows:

July 7, 1864, the Northern Pacific Railroad Company was incorporated by act of Congress (13 Stat. at L. 365). The third section of that act (omitting immaterial clauses at the end thereof) reads as follows:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, *and* whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time [of definite location], any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of

the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

Compliance with certain conditions was by other sections of the act made necessary to the enjoyment of the above grant; but it appears affirmatively from the bill of complaint that these conditions were complied with.

July 6, 1882, the railroad company filed with the Commissioner of the General Land Office its map of definite location of its line of railway coterminous with and less than forty miles from the land here in controversy. All parties concede that this land is not mineral and that when the map of definite location was filed the United States had "full title" to it. At that time one Martin Lammlein was living upon it and he continued to live there until his death, which occurred in August, 1889 (Tr. p. 531), not in 1891, as the Court of Appeals erroneously states (Tr. pp. 554, 558). During all of this time the land was unsurveyed. Before Lammlein's death, appellee purchased or agreed to purchase from him the improvements upon the land, and has since resided upon it.

The land was surveyed in 1891 and the township plat of survey embracing it was filed in the local land office August 10, 1891. No attempt was made by anyone to enter it until January 10, 1896, when appellee applied to make a homestead entry. His application was refused upon the ground that the land belonged to the railroad company under its grant. He appealed to the Commissioner of the General Land Office who affirmed the action of the local officers May

26, 1896, without prejudice, however, to appellee's right to apply for a rehearing to determine the status of the land July 6, 1882. He applied for a rehearing August 10, 1896. A rehearing was had and upon the testimony adduced the Commissioner of the General Land Office, on December 24, 1898, decided that the land belonged to the railroad company. November 30, 1896, the railroad company contracted to sell the land to David Auchard and on March 3, 1899, it conveyed it to him by warranty deed. (Tr. p. 33.) January 10, 1903, patent was issued to the defendant Northern Pacific Railway Company as successor to the Northern Pacific Railroad Company.

SPECIFICATION OF ERRORS.

I.

The court erred in holding that Lammlein's occupation, unaccompanied by any entry, either during his lifetime or within ninety days after the filing of the plat of survey, operated to except the land from the grant.

II.

The court erred in not holding that Lammlein's sale of his rights established conclusively that his occupancy was not *bona fide*.

III.

The court erred in holding that appellee was entitled to the land.

IV.

The court erred in not affirming the decree dismissing the bill.

ARGUMENT.

I.

The question upon which the case was decided, both in the Circuit Court and in the Court of Appeals turns on the decision of this Court in *Nelson v. Northern Pacific Railway Company*, 188 U. S. 108. That case, like the case at bar, dealt with lands lying within the primary limits of the grant to the Northern Pacific Railroad Company; and in that case, as in the case at bar, the land involved was *unsurveyed* when the map of definite location was filed. The plaintiff Nelson occupied it at that time; *but as soon as the land was surveyed* (and we ask the court to note the stress which, throughout the opinion, Mr. Justice Harlan places upon this fact), Nelson *at once* attempted to enter it. The act of May 14, 1880, cited and relied on by Mr. Justice Harlan in the opinion, gives the homesteader ninety days after the completion of the survey in which to make his entry, and *within this period* Nelson entered, or applied to enter the land in question.

This is the vital distinction between the Nelson case and the case at bar. In the Nelson case there was *of record* in the land office, within the period allowed to all homestead settlers in which to make their entries, an application to enter the land in question, and the good faith of the occupant of the land had been attested *of record*. In the case at bar no entry whatsoever was made by Lammlein, and his occupancy, which is relied on to except the land from the grant, had by his own act in selling to appellee been affirmatively shown to be without intention to enter under the homestead law.

Previous to the decision in the Nelson case, it had been held in *Northern Pacific Railroad Company v. Colburn*, 164 U. S. 383, that occupancy of an odd-numbered section of land within the place limits of a railroad grant, did not except it from the grant unless the occupant had manifested his good faith by an entry in the local land office. In his dissenting opinion in the Nelson case, Mr. Justice Brewer insists that the rule thus laid down was meant to apply to all cases of occupancy whether of surveyed or unsurveyed land; but Mr. Justice Harlan writing the opinion of the majority distinguishes the Colburn case from the Nelson case by pointing out that in the Colburn case the land was surveyed and the occupant could have entered it, and his failure to enter it was conclusive evidence of a lack of good faith; whereas, in the Nelson case, the land was unsurveyed at the time of filing the map of definite location, and therefore the occupant could not enter it at that time. But the point is (and, as said above, Mr. Justice Harlan himself lays special stress upon and italicizes the fact), that Nelson did seek to enter the land *promptly on the completion of the survey*, and thus got his claim of record within the time allowed by the act of May 14, 1880 for doing so.

Counsel for appellee contends, however, and the Court of Appeals has held, that the circumstance thus adverted to as distinguishing the Nelson case was but an incident of that case and not at all vital to it; that as to lands unsurveyed when map of definite location is filed, the state of the record then or at any subsequent time is utterly beside the question; that if at the time of definite location, there is present upon the land a qualified settler intending to enter it when surveyed,

the land is *ipso facto* taken out of the grant; and that even though the settler may abandon it the day after definite location, even though he may (as in the case at bar he did) actually disqualify himself to enter it by selling his rights in it in violation of a statute forbidding that very thing (Sec. 2290, R. S. as amended by act of March 3, 1891, 26 Statutes at Large, 1095) the fact that he had settled upon it and the fact that he intended to enter it may be established by oral evidence, by anyone, at any time before the issuance of patent to the railroad company.

To sustain this contention the court must disregard the purpose for which the act of 1864 was passed and a long line of decisions in which it has been construed. The grant to the Northern Pacific Railroad Company, like all other Pacific Railroad grants, was made in aid of the railroad enterprise; and it was contemplated that the company should be able to sell the lands granted and to use the proceeds from their sale long before the actual issuance of patents. Accordingly it was held at an early date that the grant was *in praesenti*; that upon filing map of definite location title attached as of the date of the grant to the specific lands granted within the place limits; that patents, though instruments of further assurance, were not necessary to the completeness of that title; and that ejectment could be maintained by the railroad company, if the lands had been identified by survey, even though no patent had issued.

St. Paul & Pac. R. R. Co. v. N. P. Ry. Co., 139 U. S. 5.

Deseret Salt Co. v. Tarpey, 142 U. S. 251.

Northern Pacific Ry. Co. v. Colburn, 164 U. S.

As was said by this court in *Tarpey v. Madsen*, 178 U. S. 227,

“Congress in making a grant to a railroad company intended that it should be *of present force, and of force with reasonable certainty*. It meant a substantial present donation of something which the railroad company *could at once use*, and use with knowledge of that which it had received.”

Such being the purpose of the grant, it was important to know in advance of the issuance of patents (for these might be delayed, and in fact have been delayed many years) exactly which of the odd numbered sections came under the grant and which of them were excepted from it; and this court early laid down the rule, from which it has never swerved, that the question whether an odd numbered section within primary limits had passed to the railroad company or had been excepted from the grant by reason of a homestead or other claim upon it must be determined *by the records of the Land Department* and that only by an entry of record in that department could the good faith of the claimants be manifested.

Thus in *Lansdale v. Daniels*, 100 U. S. 113, 116, it was said that “such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose.”

In *Kansas Pacific R. R. Co. v. Dunmeyer*, 113 U. S. 620, 644, the court, speaking of the kind of occupancy necessary to except land from a railroad grant, said:

“Of all the words in the English language, this word *attached* was probably the best that could

have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation."

In *Whitney v. Taylor*, 158 U. S. 85, 94, the court said:

"But it is also true that settlement alone without a declaratory statement creates no preemption right. 'Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that his settlement alone is not sufficient for that purpose.' *Lansdale v. Daniels*, 100 U. S. 113, 116. And the acceptance of such declaratory statement and noting the same on the books of the local land office is the official recognition of the preemption claim."

In *Northern Pacific R. R. Co. v. Colburn*, 164 U. S. 383, 386, the court said:

"If it be true, as matter of law, that mere occupation or cultivation of the premises at the time of the filing of the map of definite location, unaccompanied by any filing of a claim in the land office then or thereafter, excludes the tract from the operation of the land grant, the decision of the Supreme Court of Montana was right. But frequent decisions of this court have been to the effect that no preemption or homestead claim attaches to a tract until an entry in the local land office."

In *Tarpey v. Madsen*, 178 U. S. 216, the holding of the court is expressed in the following paragraph from the syllabus:

"A proper interpretation of the acts of Congress making railroad grants like the one in this case requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company, in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other, the declaration or entry in the local land office."

And in *United States v. C. M. & St. P. Ry. Co.*, decided at this term, the court, dealing with a grant similar to this, where it was stipulated that "none of the lands described in the bill of complaint had been covered by any homestead entry, pre-emption, declaratory statement or warrant location or other existing claims of record in the office of the Commissioner of the General Land Office," said:

"If this were the whole case, then, beyond all question, the law would be in favor of the railway company; for the grant of 1864 was one *in praesenti* for the purposes therein mentioned, and according to the settled doctrines of this court, the beneficiary of the grant was entitled to the lands granted in place limits which had not been appropriated or reserved by the United States for any purpose or to which a homestead or pre-emption right had not attached *prior to the definite location of the road* proposed to be aided."

The act of May 14, 1880 (21 Statutes at L. 141) did not change the rule which these cases lay down. Indeed most of them were decided after that law became effective. That act simply gave to the homesteader the same period of grace previously enjoyed by the preemptor within which to make his entry;

and indisputably if such an entry had been made by Lammlein or by his heirs within three months after the plat of survey was filed, the railroad company would have lost its right to the land. But when that period had expired, the land was in the same category with every other odd numbered section within primary limits to which no right had been asserted of record within the time allowed by law. It belonged to the railroad company and assuredly that company was not obliged to wait twelve years until patent should be issued before it could convey a good title to it.

The case of *Water & Mining Company v. Bugbey*, 96 U. S. 165, is exactly in point. That case involved a controversy between a settler on the one hand and a water and mining company on the other over title to a tract of land in California. In 1851, the company, apparently without authority of law, commenced the construction of a canal upon the unoccupied and unsurveyed public lands of the United States within that state for the purpose of supplying water to miners. The canal was completed at large expense in April, 1853, and it covered the premises in controversy. By the act of March 3, 1853 (10 Statutes at L. 244) Congress granted sections 16 and 36 to the State of California for school purposes, the act providing "that where *any settlement* by the erection of a dwelling house or the cultivation of any portion of the land shall be made on the sixteenth and thirty-sixth sections *before the same shall be surveyed*, other land shall be selected by the proper authorities of the state in lieu thereof." The land in question was a part of section 16. It was surveyed in May, 1866, and the plats were filed June 16, 1866. At that time Bugbey was an actual settler

upon it and had thereon a dwelling house and agricultural and other improvements. *But he filed no claim to it within the time allowed by the preemption or homestead laws.* On the contrary, he dealt with it as being the property of the state and on April 22, 1867, purchased it from the state. On July 26, 1866, Congress passed an act recognizing the rights and confirming the title of those who had completed canals across public lands for mining purposes. The mining company was within the provisions of this act and its rights were superior to those of Bugbey, the settler, if at the time of its passage the United States had title to the lands. Bugbey asserted that at that time title had passed to the State of California, and that therefore Congress was powerless to grant or to confirm the mining company's rights in it; the mining company asserted that title had not passed to the states because at the time of survey there was a "settlement" upon it; and this was the one question in the case.

The court will observe how exact is the parallel here with the case at bar. From the grant to the state of California there were excepted lands upon which there was "any settlement," just as from the grant to the Northern Pacific Railroad Company there were excepted lands "occupied by homestead settlers." And if the mere physical presence upon the land of the "settlement" in the one case or of the "homestead settler" in the other, as facts to be established by oral testimony, had been all that was required to give rise to the exception and take the land out of the grant, the mining company must have prevailed, because there was indisputably a settlement upon the land when the survey was completed. But the settler in that case, as

Lammlein in this case, *made no entry within the time allowed by law for doing so*; and having failed to do so, he is said by the court to have abandoned it—just as Lammlein in a more emphatic way abandoned his claim when he sold whatever rights he had in it to the appellee. And the court held that because the settler failed to assert his claim to it, the title passed to the state, saying:

“As against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the surveys; and if the settler failed to assert his claim, or to make it good, the rights of the State *became absolute*. * * * The settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the State *became absolute as of May 19, 1866, when the surveys were completed*. The case stands, therefore, as if at that date the United States had parted with all interest in and control over the property. As the act of July 26 was not passed until after that time, it follows that it could not operate upon this land in favor of the company.”

It is not possible to distinguish these two cases. The question whether title passed to the State of California in the Bugbey case depended upon the condition of the land at date of survey, just as in this case the question whether the land passed to the railroad company depended upon its condition at date of definite location. If there was a settlement upon the land at date of survey, the land was excepted from the grant to California. If there was a homestead settler upon the land at definite location, the land was excepted from the grant to the railroad company. As

a matter of actual, physical fact there was a settlement upon the land in the Bugbey case at date of survey, and as a matter of actual, physical fact there was a settler upon the land involved in this case at date of definite location. But because of the failure of the settler in the Bugbey case to follow up his settlement by entry in the land office within the time required by law, it was held that the title *became absolute* in the state as of date of survey and that Congress lost all control over it. Clearly by the same reasoning upon failure to make entry in the present case the title of the railroad company became absolute.

The case of *Buxton v. Traver*, 130 U. S. 232, is likewise in point. In that case it appeared that certain lands in California had been occupied by one Oscar Traver from 1870 until his death in 1877. *During all this time these lands were unsurveyed.* Thereafter they were surveyed and the township plat was filed July 1, 1879; and Hattie L. Traver, the widow of the occupant, made preemption declaratory statement in her own right and obtained patent to the lands. The suit was brought by two daughters of the patentee, who alleged that they, with the patentee, were the only heirs of Oscar Traver, the original occupant, and that under Section 2269 of the Revised Statutes the patent obtained by the widow accrued to the benefit of the heirs. But the court, speaking unanimously through Mr. Justice Field, said:

"A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. If, *within a specified time after*

the surveys, and the return of the township plat, the settler takes certain steps, that is, files a declaratory statement, such as is required when the surveys have preceded settlement, and performs certain other acts prescribed by law, he acquires for the first time a right of preemption to the land, that is, a right to purchase it in preference to others. Until then he has no estate in the land which he can devise by will, or which, in case of his death, will pass to his heirs at law. He has been permitted by the government to occupy a certain portion of the public lands and therefore is not a trespasser, on his statement that when the property is open to sale he intends to take the steps prescribed by law to purchase it; in which case he is to have the preference over others in purchasing, that is, the right to preempt it. The United States make no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him—if you wish to settle upon a portion of the public lands, and purchase the title, you can occupy any unsurveyed lands which are vacant and have not been reserved from sale; and, when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, *by pursuing certain steps*, the right to purchase them. If those steps are *from any cause* not taken, the proffer of the government has not been accepted, and a title in the occupant is not even initiated. *The title to the land remains unaffected*, and subject to the control and disposition of the government, as before his occupancy.”

The principles announced in the foregoing decisions, we repeat, have never been departed from. The Nelson case is in strict accord with them. It holds that occupancy in good faith of unsurveyed land in an odd numbered section within primary limits at date of definite location will except the land occupied from the

grant ; but nothing is said in the opinion to indicate that the court has departed from the principle that the occupant must manifest his good faith by an entry within the time required by law.

In further support of its decision reversing the decree of the Circuit Court, the Court of Appeals refers to its own opinion in *Railway Company v. McCormick*, 94 Fed. Rep. 932. But the decision in the McCormick case is in strict accord with the construction which, as we contend, the Nelson case must bear. In the McCormick case, as in the Nelson case, the person in possession of the unsurveyed land when map of definite location was filed, *made his entry within the time prescribed by law* after completion of the survey. This point is brought out by Judge Morrow in the decision where in distinguishing the Colburn case he says : "The facts in that case did not require the court to determine the effect of a settlement upon public land by a qualified settler, followed by pre-emption entry *within the time prescribed by law*." And as showing that the distinction upon which we are here insisting was present at least to the mind of the author of the opinion in the McCormick case, we call the court's attention to the fact that Judge Morrow, who wrote the opinion in that case, has dissented vigorously from the opinion of the Court of Appeals in the case at bar, holding that the railroad company was clearly entitled to the land in question. (Transcript pp. 562-570.)

That this is the correct view of what was decided in the Nelson case appears very clearly from the only decision since rendered by this Court, in which, so far as we can find, this question has been considered or the doctrine of the Nelson case applied. We refer to *Ore-*

gon & California R. R. Co. v. U. S., 189 U. S. 103. That case involved the construction of a railroad grant, identical in its terms (so far as regards the present controversy) with the Northern Pacific grant; and in that case, as in the Nelson case, the railroad company had received patents from the government under its grant to the lands in question. That case involved lands within the indemnity limits of the grant. These lands had been occupied for years previous to the survey by homestead settlers. Immediately after survey and before any claims by the homestead settlers were filed, the railroad company selected the lands. After such selection, *but within the ninety days allowed by the act of May 14, 1880*, applications to enter the land as homesteads were made by the occupants. Mr. Justice Harlan, in holding that the rights of the occupants under these circumstances were superior to those of the railroad company, adverted again to the decision in the Nelson case, written by him but a few months before, and said:

But it is contended that as the selection by the company (except as to the tract which was occupied in 1869, before any selection by the company of lieu lands) was prior to the application by the respective settlers for entry under the homestead laws, its right to the lands in question was superior to that asserted by the settlers. This view is completely met by the fact that the settler, by prior occupancy in good faith, could avail himself of the homestead acts whenever, by an official survey, the way is opened by the government for him to do so, *and by the fact that, within ninety days after these lands were surveyed*, he filed in the proper office his application to enter them under the homestead laws of the

United States. He moved *with due diligence* to protect and perfect the right acquired by his occupancy of the land with the intention to avail himself of the benefit of those laws. That right was not to be affected or impaired by the fact that the lands were not surveyed at the date of occupancy. *Nelson v. Northern Pac. Ry.*, 188 U. S. 108, ante 406, 23 Sup. Ct. Rep. 302; *Ard v. Brandon*, 156 U. S. 537, 543, 39 L. Ed. 524, 526, 15 Sup. Ct. Rep. 406, 409; *Tarpey v. Madson*, 178 U. S. 215, 219, 44 L. Ed. 1042, 1044, 20 Sup. Ct. Rep. 849, 850. In the *Ard* case, the court said:

“The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or not he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application.’ In the *Tarpey* case it was said that ‘the right of one who has actually occupied (public lands), with an intent to make a homestead or preemption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent,’ that if a settler was in possession before definite location, ‘with a view of entering it as a homestead or preemption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights.’ So, if the condition of the lands, being unsurveyed, prevents the making by a *bona fide* occupant of a proper application of record to enter them under the homestead laws his rights will not be lost, if, after the lands are surveyed, he applied *in due time* to enter the lands under

those laws. And such has been held to be the object and effect of the act of May 14, 1880, c. 89, 21 Stat. 140 (U. S. Comp. Stat. 1901, p. 1392). We could not otherwise adjudge in this case without holding that the mere selection of the lands by the railroad company displaced or destroyed the rights of a *bona fide* settler arising from previous occupancy with the intention of making the required homestead entry whenever he was permitted to do so. We cannot so hold. We adjudge that the rights which *bona fide* occupancy gave to the settler under the act of 1866 are not defeated by a mere selection afterwards of the lands by the railroad company—the settler having, after the lands were surveyed, *promptly* taken the necessary steps to protect his rights under the homestead laws. And in such case, the entry made under those laws, relates back to the date of settlement on the lands. It was so substantially held in *Nelson v. Northern Pac. Ry.* (188 U. S. 108, ante 406, 23 Sup. Ct. Rep. 302.)”

Here the superiority of the occupants’ right is expressly rested upon the fact that they moved within the period allowed them by the Act of May 14, 1880.

It will not be contended in view of the decision in the Colburn case, and the decision at this term in *United States v. C. M. & St. P. Ry. Co.*, *supra*, that the occupant of *surveyed* land within primary limits has any right as against the railroad company unless his entry is of record when the map of definite location is filed; his rights are fixed absolutely by the condition of the record at that time. He may be able to advance excellent excuses for not having it of record at that time, but these will not avail him. Though hardship may result in a particular case from the application of this rule it must be borne because of the neces-

sity of having a definite and fixed time at which the question of occupancy or non-occupancy shall be deemed settled.

Why is there any less necessity for such a rule in the case of lands *unsurveyed* when map of definite location is filed? Why should there not be a fixed time in the case of such lands when the settler's right either as against the government or the railroad company must be definitely and formally asserted? And what other period of time can this be than the period of ninety days after filing of the township plat, which is fixed by the Act of May 14, 1880?

Counsel say that the question whether lands unsurveyed when map of definite location is filed were at that time occupied in good faith by settlers remains open until patent is issued; and they refer to *Barden v. Northern Pacific R. R. Co.*, 154 U. S. 288, as supporting this. But that case announces no such rule. That case decided that the question *whether lands were mineral in character*, and so excepted from the grant, was open until patent issued; and this would be true (in the absence of direct legislation upon the question, and there was no such legislation when that case was decided) whether the lands were surveyed or unsurveyed at date of definite location. But it has never been held or suggested in any decision that the question *whether lands were occupied in good faith by a person intending to enter them* remained open in the same way.

The decision in the Barden case and the legislation which followed it illustrate strikingly what, as we have said, has all along been the view of both Congress and the courts as to the importance of promptly ascertain-

ing what lands passed to the railroad company under the grant. When that case came before the Supreme Court in 1894, it was recognized that the rule laid down in the decision would create a doubt as to the validity of the railroad company's title until such time as a patent, amounting to an adjudication that the land was non-mineral should issue; and in consequence of that decision and of the intimation contained in it that legislation should be enacted providing for a definite ascertainment of the character of the lands within the grant, the Act of Congress of February 26, 1895 (28 Statutes at L. 682) was enacted. That act provided for the examination and classification of these lands for the very purpose of removing whatever doubt should exist previous to the issuance of patent as to where the title lay, and of enabling the railroad company to convey a perfectly valid title to lands classified as non-mineral, even though patent had not issued.

The principle laid down in the Barden case was applied to the question whether lands were excepted from the grant by reason of their *physical character*. That question could be resolved by actual examination of the lands; and could be resolved as well at one time as at another. But when, two years later, in the case of *Northern Pacific Ry. Co. v. Colburn*, 164 U. S. 383, the question arose whether lands were excepted from the grant *because of their occupancy by bona fide settlers*, this court never thought of applying, for the determination of *that* question, the principle which it had laid down for determining the physical character of the lands. Had the principle for which counsel is here contending appealed to it as sound, it certainly would have been applied. The Barden case had been decided

only two years before. Yet by its unanimous decision the court in the Colburn case adhered to the principle which it had so many times previously announced that the good faith of the homesteader or other occupant must be attested of record in order to except the land from the grant.

Nor is it in the slightest degree inconsistent or illogical, nor does it work any hardship on the occupant to apply this rule. Certainly it is no hardship to hold him to that same diligence which he must exercise as against other claimants; and certainly it is no more illogical to say that the time when the railroad company shall definitely know what lands belong to it shall be fixed at ninety days from the date of filing of the plat of survey than it is to say that this time shall be fixed as the date of the issuance of the patent. On counsel's own contention where lands are unsurveyed when map of definite location is filed the question what lands actually passed to the railroad company must remain suspended until it shall have been resolved by the issuance of a patent; and it is no more illogical to say that this question shall be resolved at one time and in one way than it is to say that it shall be resolved at a later time and in a different way; and the purposes underlying the grant, as stated by this court in *Tarpey v. Madsen, supra*, require that the question shall be *promptly* resolved.

It is said that if the railroad company at any time between definite location and the death of Lammlein had sought to eject him it must have failed in the action. It is a sufficient answer to this argument to say that while the land was unsurveyed the railroad company could not have maintained ejectment or any other

action at law. *Northern Pacific Ry. Co. v. Hussey*, 61 ~~U. S.~~ 235; *United States v. Montana Lbr. Co.*, 196 U. S. 573. Until the odd numbered sections were defined by survey they were within the jurisdiction of the Land Department; *Humbird v. Avery*, 195 U. S. 480; and though it has been held in *Northern Pacific Ry. Co. v. Hussey*, *supra*, that the railroad company might maintain an *equitable* action to enjoin waste, the courts could not entertain an action at law to determine who was entitled to possession of them.

Counsel say that the rule we contend for would result in defeating the right of every *bona fide* homestead settler who was in actual possession of unsurveyed lands when map of definite location was filed and who died before completion of the survey. But this is not so. Under Section 2291, the widow or heirs of such a settler could, of course, prove up within the same time after the completion of survey that the law gives to the settler himself; and so (to take a case supposed by counsel in his brief below), if Lammlein had continued to occupy the premises until the day before the plats were filed in 1891, and had then died, his widow or his heirs might unquestionably have made a valid entry of the land within ninety days thereafter. But if, previous to his death, he had bargained away such possessory rights as he had in the land, it is surely unreasonable to hold that it is excepted from the grant by reason of its occupation in good faith with an intention to enter when survey should have been completed, in the face of evidence absolutely disqualifying the occupant as an entryman and conclusively negating any intention to enter. (34 Land Decisions p. 46.)

But even if it could be said that Lammlein was prevented by death from entering the land within ninety days after the survey, this excuse cannot be made for appellee. He claims to have succeeded to Lammlein's rights. He was in possession of the land when surveyed in 1891, and never applied to enter it until four and one-half years thereafter. If, as Lammlein's successor, he could assert Lammlein's rights during the ninety days following the filing of the township plats, he failed to do so. By his failure to do so, his rights expired under the Act of May 14, 1880, certainly as against the United States, and we insist that they expired equally as against the grantees of the United States.

The importance of this question is not to be measured by the amount of land involved in this case, and we ask the court in deciding it to consider the principle which appellee seeks to establish and how far-reaching would be the consequences of an authoritative announcement of that principle as one of railroad land grant law. The great bulk of the lands granted to the Northern Pacific Railroad Company were unsurveyed when map of definite location was filed. As they have been surveyed and identified, the odd numbered sections lying within primary limits and classified as non-mineral have been uniformly dealt with as belonging to the railroad company if *within the time allowed by the act of May 14, 1880*, no attempt has been made to enter them. The issuance of patents covering them is frequently delayed for years. In the case at bar, for example, though the plats of survey were filed in 1891 patent did not issue

until 1903. But if the decision appealed from is affirmed, the title to all such lands must remain uncertain. Anyone may seek to enter them and anyone will be allowed to enter them upon a mere *oral showing* that at date of definite location, A, B or C was living upon them and an *oral showing* that he intended to enter them. The occupant, as in the case at bar, may have been dead when survey was completed or may have abandoned the lands years before. The question of his citizenship and of his right to enter them may, as in the case at bar, be left altogether unsettled; the question of his intention to enter them at all would have to be resolved, as in the case at bar, by oral testimony, and that of a hearsay character; the impossibility of successfully meeting and overcoming such testimony concerning events so remote is obvious; and yet to a showing of such a character the rights of the railroad company must yield.

II.

As already stated, this case has turned in both of the lower courts upon the point above discussed and accordingly we have devoted the greater portion of this brief to its consideration. But in a sense the point is not in the case because regardless of the question of the railroad company's right to the land, appellee's failure to show that he is entitled to it requires a dismissal of the bill. The legal title is in appellants; and appellee brings this suit in equity to have it decreed that this title is held in trust for him. It has been many times decided that in such a suit, complainant must suc-

ceed, not upon the weakness of his adversary's title, but upon the strength of his own and that unless it affirmatively appears that he is entitled to the land, he cannot prevail.

Bohall v. Dilla, 114 U. S. 47.

Sparks v. Pierce, 115 U. S. 408.

Lee v. Johnson, 116 U. S. 48.

This being so, the suit must fail because it does not appear that appellee is not the owner of one hundred and sixty acres of land in any state or territory.

Under section 2289 of the Revised Statutes, as amended by section 5 of the Act of March 3, 1891, "no person who is the proprietor of more than one hundred and sixty acres of land in any state or territory, shall acquire any right under the homestead law;" and in proceedings before the Land Department to obtain title to land under that law, the fact that the applicant is not the owner of this quantity of land is the first fact which must be made to appear. (See form of affidavit required by the Department, printed as an appendix to this brief.) Whether appellee is or is not the owner of this quantity of land has nowhere been shown in these proceedings. He could not acquire title from the government as a homesteader without showing it; and *a fortiori* he cannot divest others of the title which the government has given to them without showing it.

The failure of appellee's proof in this respect has been insisted upon at every stage of the suit. It was urged upon the Circuit Court when the case was brought on for hearing upon the testimony taken before the special examiner, at a time when, had the nec-

essary evidence been forthcoming, the court would doubtless, on application, have permitted appellee to supply it. That court held, however, that the railroad company was entitled to the land; and dismissing the suit upon that ground, it did not pass upon the point. It was again urged in the Court of Appeals as a reason for affirming the Circuit Court's decree. The Court of Appeals in reversing the decree makes no reference to it whatsoever, holding that appellee may deprive the legal owners of their title upon a showing which confessedly would be insufficient to obtain title in the first instance from the government.

As the Court of Appeals does not state the grounds upon which this conclusion is reached, we can only surmise that the argument of appellee's counsel in that court was thought to be a sufficient answer to the point. That argument, as developed in the brief below, was that as the answer of the railroad company was silent upon the question whether appellee was or was not the owner of one hundred and sixty acres of land, the point was not available, and that appellee's possession of this qualification was not a thing to be affirmatively proved by him but a thing to be disproved by us before the point would be available.

We cannot believe that so astounding a doctrine will receive the sanction of this court. To sanction it would be to reverse established rules of evidence and to place one who attacks a title in a better position than that of the one who possesses it. In a suit like this complainant must show in order by virtue of his rights under the homestead law to get the title from an individual in whom it stands, exactly what he must show to the government in order

to get title from it by virtue of his rights under that law. He is a suitor in a court of equity. He is asking for equitable relief. Principles as old as equity jurisprudence require that he shall fully and fairly state his case and prove it. One who neglects or fails to show non-ownership of one hundred and sixty acres of land is certainly not entitled, under the homestead law, to patent from the government; and assuredly his rights are not increased nor is the establishment of them to be facilitated merely because he is asserting them in a court instead of before the Land Department.

The unreason of relieving him from the burden of supplying this affirmative proof is well illustrated by the suggestion in counsel's brief below as to how the fact of ownership of one hundred and sixty acres of land should be developed and established. "If such a state of facts existed," they say, "defendant should have pleaded and proved it." But how could the defendants know anything about it? Must the railroad company, when brought into a court of equity to protect its property against one claiming to be equitably entitled to it, conduct an independent investigation to ascertain whether the complainant is really qualified to enter the land? To ask such a question is to answer it. The facts are in the possession of the complainant. They form an essential part of the equities upon which his claim rests. The burden is upon him to establish them; and having failed to establish them he cannot prevail.

CHARLES W. BUNN.

CHARLES DONNELLY.

APPENDIX. HOMESTEAD AFFIDAVIT.

U. S. Land Office at.....
....., 19.....

I, of
having filed my application, No....., for an
entry under Section 2289, Revised Statutes of the
United States, do solemnly swear *that I am not the
proprietor of more than one hundred and sixty acres
of land in any State or Territory*; that I am (b)
.....; that my application is honest-
ly and in good faith made for the purpose of actual
settlement and cultivation, and not for the benefit of
any other person, persons, or corporation, and that
I will faithfully and honestly endeavor to comply with
all requirements of law as to settlement, residence,
and cultivation necessary to acquire title to the land
applied for; that I am not acting as agent of any per-
son, corporation, or syndicate in making such entry,
nor in collusion with any person, corporation, or syn-
dicate to give them the benefit of the land entered, or
any part thereof, or the timber thereon; that I do not
apply to enter the same for the purpose of specula-
tion, but in good faith to obtain a home for myself,
and that I have not directly or indirectly made, and
will not make, any agreement or contract in any way
or manner, with any person or persons, corporation or
syndicate whatsoever, by which the title which I
might acquire from the Government of the United
States should inure in whole or in part to the benefit
of any person except myself; and further, that since
August 30, 1890, I have not acquired title to, nor am
I now claiming under any of the agricultural public
land laws, an amount of land which, together with the
land now applied for, will exceed in the aggregate
three hundred and twenty acres, except.....
and that I have not heretofore made any entry under
the homestead laws except.....
(Sign plainly with full Christian name.)

.....

Sworn to and subscribed before me this.....
 day of....., 19....., at my office at
, in.....County,

(b) Here insert statement that affiant is a citizen of the United States, or that he has filed his declaration of intention to become such, and that he is the head of a family, or is over twenty-one years of age, as the case may be. It should be stated whether applicant is *native born* or not, and if not, a certified copy of his certificate of naturalization, or declaration of intention, as the case may be, must be furnished. (See circular of Land Department of January 25, 1904.)

U.S. DEPT. OF JUSTICE
RECEIVED

MAR 29 1911

JAMES H. MCKENNEY,

CLERK.

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 117.

NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES AUCHARD,
as Administratrix with the Will Annexed of
DAVID AUCHARD, Deceased,

Appellants,

v.

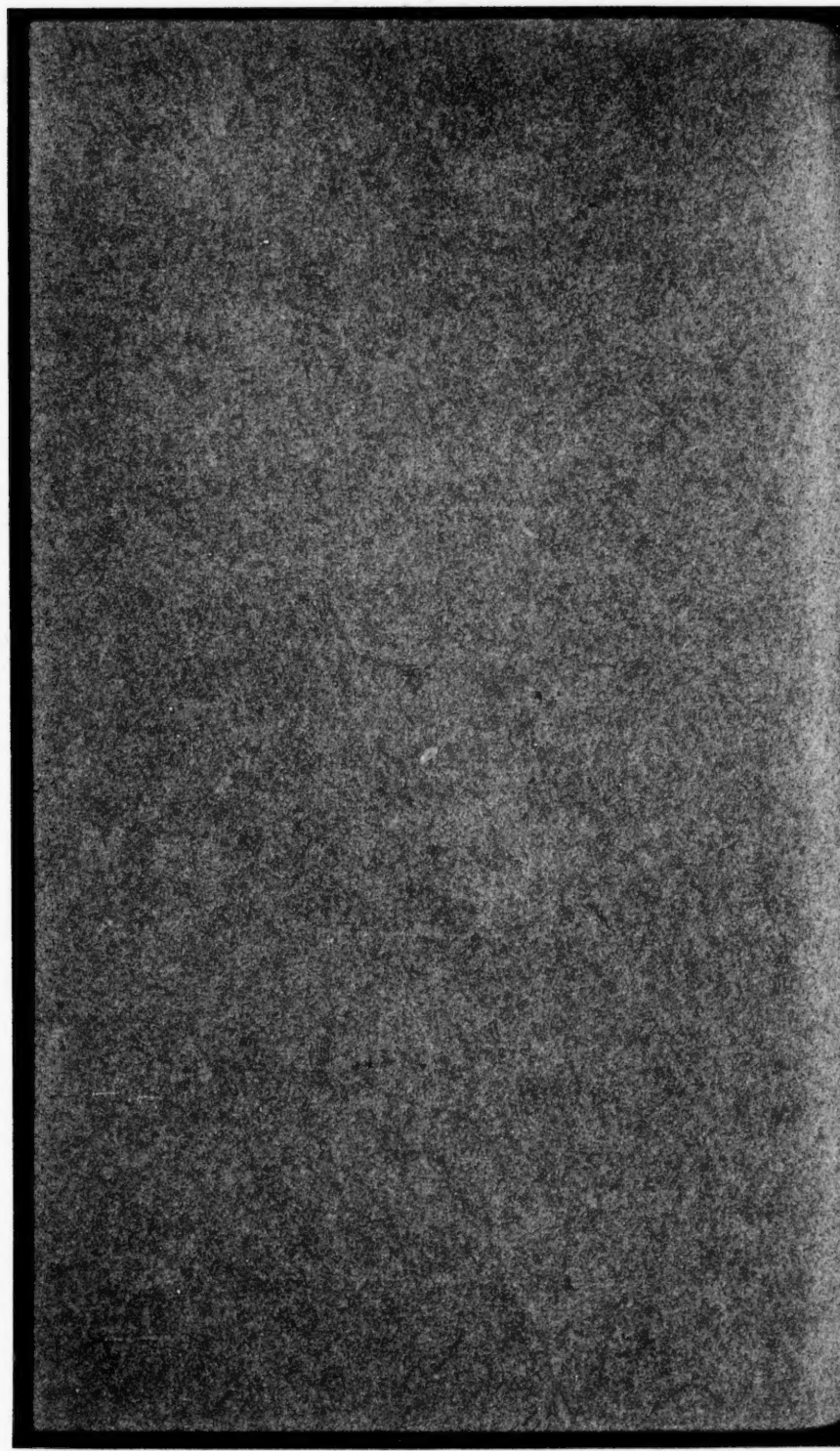
JOHN TRODICK,

Appellee.

BRIEF OF APPELLER

WALSH & KOLAN,
Solicitors for Appeller.

THOMAS J. WALSH,
Counsel for Appeller.



Supreme Court of the United States

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NORTHERN PACIFIC RAILWAY COMPANY,
ALBION McDONALD and AGNES AUCHARD,
as Administratrix with the Will Annexed of
DAVID AUCHARD, Deceased,

Appellants,

v.

JOHN TRODICK,

Appellee.

BRIEF OF APPELLEE.

The brief of appellants would have given a more accurate idea of the case had it adverted to some features in respect to which it is silent.

The land in question was occupied at the time of the filing of its map of definite location by the Northern Pacific Railway Company in 1882, by one Martin Lammlein, who established his residence upon it in the year 1877. He settled upon the land, occupied and cultivated it, intending to acquire title to it as a homestead as soon as it should be surveyed, and making claim to it as his homestead.

Record, pages 520, 45, 48-49.

The land was unsurveyed at the time of the filing

of the map and continued so until August 10, 1891, when the plats were filed in the local land office. Lammlein continued to reside on the land until his death in 1889. Shortly before he departed this life, he sold his improvements to the appellee, Trodick, who took possession upon his death, intending to acquire title to the land under the homestead law. He has since continuously resided on it. He delayed applying to enter the land until July 6, 1896, when he was denied the right to do so without prejudice to his right to apply to be heard as to the conditions that existed on July 6, 1882, when the map of definite location was filed.

He made such application and upon the hearing on December 24, 1898, his application was rejected by the Honorable Commissioner of the General Land Office, who ruled that under the decision in

N. P. R. Co. v. Colburn, 164 U. S. 537,

he could assert no right as against the railway company because there was no claim *of record* at the time of the filing of the map of definite location.

The Commissioner's opinion on the case as presented to him is as follows:

“DEPARTMENT OF THE INTERIOR,

“United States Land Office,

“Washington, D. C., Dec. 24, 1898.

“Register and Receiver, Helena, Montana.

“Sir: I have considered the case of *John Trodick vs. Northern Pacific R. R. Co.*, in-

volving the SE. $\frac{1}{4}$, Sec. 35, Tp. 15 N., R. 4 W., situated within the primary limits of the grant to the company, the right of which attached July 6, 1882, when the map of the definite location of its road was filed.

"The plat of survey embracing the land was filed in the local office August 10, 1891, and the tract was listed by the company September 21, 1892, per list No. 215.

"The records of this office show no pre-existing adverse claims to the same.

"Mr. *Trodrick* applied to make homestead entry for the land January 10, 1896, and being refused he appealed to this office, which affirmed your action May 26, 1896, without prejudice to his right to apply for a hearing to determine the status of the land July 6, 1882, when the right of the company became effective.

"He applied for a hearing August 10, 1896, whereupon notice issued citing the parties in interest to appear at your office September 21, 1896. The hearing was continued from time to time until April 16, 1897, when both parties were represented.

"It appears from the evidence adduced that one Martin Lemline established his residence on the land, with his family, in 1877, continued to reside there until his death, some time in 1891, and his improvements on the premises were of the estimated value of \$1,000.

"Mr. *Trodrick* settled on the land in 1891, and since then has continuously resided there.

"The material question for determination in this case is this: Did the settlement claim of Mr. Lemline except the land from the operation of the grant to the company?

"It is undoubtedly true that the land was occupied by Mr. Lemline when the right of the company attached, that he was qualified to make entry of the same and settled there with the intention of doing so, as the circumstances indicate. Had he lived until the plat of survey was filed in your office, he or his wife,

would, without doubt, have been allowed to perfect the claim by them initiated prior to July 6, 1882.

"Since Mr. Lemline had no claim of record, and the claim of *Trodrick* had its inception subsequent to the definite location of the road, it must be held that the land inured to the grant. (*N. P. R. R. Co. v. Colburn*, 164 U. S. 537.)

"Your action is therefore approved and the application of *Trodrick* is accordingly rejected, subject to the usual right of appeal within sixty days. You will advise him of this action, and make prompt report at the expiration of the appeal period.

"The company will be notified from this office.

"Very respectfully,

"BENJ. HERMANN,

"Commissioner."

J. T. A.

Record, pages 502-504.

The present record shows that the appellee settled on the land on buying the place from Lammlein in 1889, not in 1891, as recited in the opinion quoted above.

He is an old man, over eighty-three years, unable to read or write English,

Record, page 157,

who makes his mark instead of signing his name to his testimony.

The land was patented to the railway company January 10, 1903. In March, 1904, he began this action to have it adjudged to hold the title in trust for him.

I.

THE RIGHT OF THE RAILWAY COMPANY.

The right of the appellee to this land rests upon the decision of this court in

Nelson v. N. P. Ry. Co. 188 U. S. 108, decided January 26, 1903. The proposition determined in that case, bearing in mind that the court was considering the case of land that was unsurveyed at the time of the filing of the map of definite location, is gathered from the following from the syllabus:

"Continuous occupation of public land with a bona fide intention to acquire it under the homestead laws as soon as it shall be surveyed, constitutes, when begun prior to the definite location by the Northern Pacific Railway Company of its route, a 'claim' upon the land within the meaning of the act of congress of July 2, 1864, chapter 217, (13 Stats. at L. 365), Sec. 3, restricting the grant in and of such railroad to such odd-numbered sections within specified limits as were free from pre-emption or 'other claims or rights' at the date of definite location, and authorizing the company to select other lands in lieu of any found at that date to be occupied by homestead settlers."

Inasmuch as the land was occupied under a bona fide homestead claim at the time of the filing of the map of the definite location of the road in 1882, the grant did not attach to it at all.

The right of the Northern Pacific Railway Company to the land is to be determined by the conditions existing on the 6th day of July, 1882, when its

map of definite location was filed. It became the owner of the land on that day by virtue of its grant, or it never did. If there existed at that time a bona fide homestead claim attaching to the land, it was excepted from the grant and did not pass.

If the Northern Pacific Railroad Company had at any time prior to his death brought action to oust Lammlein from the possession of the premises, or to recover from him the value of the use and occupation thereof, it must inevitably have failed. It could not have proved title. His occupancy of the premises, claiming the same as a homestead settler at the time of the filing of the map of definite location, the land being unsurveyed, would overcome the claim of the railroad to it.

As the grant did not attach to it, as it was excepted from its operation by the conditions existing at the time of the filing of the map of definite location, it remained public land subject to Lammlein's right to enter it as a homestead. If for any reason he did not enter it as a homestead, or his right to the land, for any reason, terminated, it dropped back into the general body of the public lands. The grant to the railroad company, which had become fixed and definite as to all non-mineral lands, immediately on the filing of the map, did not, after the manner of an elastic blanket, expand and take it in. It became subject, whenever Lammlein's rights terminated, to entry under any of the

laws of the United States for the appropriation of the public domain, applicable to land of that character, to pre-emption, homestead or other similar entry.

Whether Lammlein sold to appellee his improvements on the land or attempted to sell his right to the possession, or any rights in the land, is utterly beside the question. He could transfer no rights to the land. He could, of course, make terms with any one as a condition of surrendering the possession and the transfer of his improvements.

The brief of the appellants seeks to impress the court with the idea that some offense was committed in fraud of the land laws in the transfer from Lammlein to appellee.

This court has frequently recognized the right of the settler to bargain for the surrender of the possession of public lands occupied by him, and the validity of contracts founded upon such a consideration has been repeatedly affirmed.

In

Catholic Bishop of Nesqually vs. Gibbon,
158 U. S. 155,

this court, after remarking that the pioneer had always been regarded as entitled to favorable consideration, quoted as follows from

Lamb vs. Davenport, 18 Wall. 307:

“Of course, no legal title vested in any one by these proceedings, for that remained in the United States—all of which was well known

and undisputed. But it was equally well known that these possessory rights, and improvements placed on the soil, were by the policy of the government generally protected, so far, at least, as to give priority of the right to purchase whenever the land was offered for sale, and where no special reason existed to the contrary. And though these rights or claims rested on no statute, or any positive promise, the general recognition of them in the end by the government, and its disposition to protect the meritorious actual settlers, who were the pioneers of emigration in the new territories, gave a decided and well understood value to these claims. They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid' "

It is a fair assumption that the railroad grant acts were not so framed as that the grant would expand and take in lands subject to claims at the time of the filing of the map of definite location when, for any cause, the right of the occupying claimant should terminate, because such a provision would deny to him the opportunity to sell his holdings and practically operate to forfeit his improvements to the railroad company should he attempt to do so, or, unfortunately, die, before his claim was perfected.

Appellee could acquire no right, in or to the land by reason of any conveyance or sale from Lammlein. He was in no better position than one who should take possession and occupy the premises upon their abandonment by Lammlein. But such an occupant would have a perfect right to enter

the premises as a homestead. The railroad company has no right to it. Its grant never did attach to it. Lammlein's right is gone by reason of his abandonment. It is in the same condition as any other piece of public land open to appropriation by any comer.

At page 24 of the brief of appellants the assertion is made that appellee "claims to have succeeded to Lammlein's rights."

No such claim is made by appellee at all, as heretofore shown. The preference right to enter is, as shown, not transferable. The actual possession of a homestead occupant before survey may be delivered up, but he can transfer no *right* to possession. There was and could be no "succession" to Lammlein's rights in any one. His death terminated his possession if it had not ceased prior thereto on the sale of his improvements. Such right as appellee then had, he had by virtue of his being a qualified homesteader in the occupancy of land open to disposition under the homestead law, intending to enter it as a homestead.

Herein was the error of the learned trial judge. It is evident that he labored under an impression that the complainant must trace a relation of succession between himself and Lammlein, making his claim thus by relation antedate the filing of the map of definite location, and becoming entitled to the land only in case Lammlein had done everything

which would entitle him to a patent. His views are thus expressed :

“By the act of congress of May 14, 1880 (Vol. 21, U. S. Statutes at Large, 140) the settler upon public unsurveyed lands, who intended to claim under the homestead laws, was allowed the same time to file his homestead application, and to perfect his original entry in the United States land office, as was allowed to a pre-emption settler to put his claim on record, and it was provided that his right should relate back to the date of settlement, the same as if he settled under the pre-emption laws. This would have given Lammlein, had he lived, ninety days after the filing of the township plat (August 10, 1891), within which time he was obliged to put his application for entry on file, so as to become of record. He had sold, however, to Trodick in 1889, so that the very best possible position that may be conceded to Trodick is such as Lammlein could have occupied, if he had not sold, and had lived until after the plats of survey were filed. But even upon such a concession, it became his duty, as it would have been Lammlein's duty, to file his application for homestead within ninety days after the filing of the township plat in 1891. He failed to do so, though, and by his omission he lost his rights to enter the land under the homestead laws.”

But the court lost sight of what was decided in

N. P. R. Co. vs. Sanders, 166 U. S. 620,

and the application made of it in the Nelson case.

In that case it appeared that the ground in question at the time of the filing of the map of definite location was covered by and embraced in certain placer mining locations, and there were pending

in the local land office applications for patents under such locations.

Really, the lands never were subject to entry as placer, and it was conceded in the action that they "did not contain gold or other precious metals in paying quantities or in such quantities as to make the same or any part thereof commercially valuable."

In fact, Sanders, asserting that the lands were non-mineral, after the map of definite location was filed, entered the lands as agricultural in character and they were patented to him.

The action of the land department in patenting the lands to Sanders was approved, the Court holding that the railroad company never got any title to them, that its grant never attached to the land involved, and that on the extinction of the mineral claim they became subject to appropriation as other public lands.

The court went farther and said:

"Indeed if it now appeared that the land office finally adjudged, after the definite location of the road, that the lands embraced by those applications were not mineral, they could not be held to have passed to the railroad company under the act of 1864, for the reason that they were not, at the time of such definite location, free from pre-emption or other claims or rights."

As in that case, it was immaterial whether by reason of any condition then existing or by reason

of any omission on their part after the filing of the map of definite location, the mineral claimants might find themselves, as they evidently did, unable to perfect their title and to obtain patent, so in this case it is immaterial whether Lammlein, after the filing of the map of definite location, by any deed of commission or by any omission on his part, placed himself in a position where he could not claim a patent to the land. The determinative question is, was there a *bona fide* claim to the land at the time of the filing of the map of definite location? If there was, the Northern Pacific Railroad Company has no right to the land under its grant, nor have its assignees, claiming thereunder.

A considerable quantity of evidence was introduced touching the question as to whether Lammlein sold to the appellee, as the latter claims, or to one Houghton, who sold to appellee, as the appellants claim. It is utterly immaterial what the fact is as to this matter or whether he sold to either. The claim of the appellee is in no manner dependent upon his connecting himself either directly or indirectly with Lammlein, further than to show Lammlein's claim to the land, his possession and occupancy with intent to enter it at the time of the filing of the map of definite location. This very matter was considered and disposed of in the Sanders case, as witness the following from the opinion:

"But it is said that no account is to be taken

of those applications (of the mineral claimants) for the reason that the present defendants, who had nothing to do with them, and had no interest in them, confess in their answer that the lands in question did not contain gold or other metals in paying quantities or in such quantity as to make the same, or any part thereof, commercially valuable therefor; that the lands are therefore to be regarded as agricultural lands that passed to the company under the act of 1864, and were preserved to it by the filing of the map of the general route in 1872 and by their withdrawal in that year by the general land office 'from sale or location, pre-emption or homestead entry.' This view overlooks the fact that the express declaration of congress was that no public lands should pass to the company to which at the time of the definite location of the road the United States did not have title free from preemption, or other claims or rights."

The doctrine thus announced, that upon the subsequent determination of the claim outstanding against any particular tract at the time of the definite location of the road, without such claim culminating in a patent, the grant to the railroad company did not open and embrace it, had, it was shown, been repeatedly asserted by the court. The court referred to its ruling in

Kansas R. R. Co. vs. Dunmeyer, 113 U. S. 629,

in which it appeared that a certain tract of land was embraced in a homestead entry at the time the line of the road was definitely fixed, the grant containing reservations similar to the one under consideration. The homesteader subsequently aban-

doned the claim and the railroad company asserted that thereupon "the grant by its inherent force re-asserted itself and extended to or covered the land as though it had never been within the exception." But the court declined to adopt this view, and held that the land on its abandonment by the occupant, became subject to appropriation like any other public land.

Reference was made to

Hastings V. D. R. Co. v. Whitney, 132 U. S.
357,

and the following quotation made from the opinion :

"For the foregoing reasons we concur with the court below that Turner's homestead entry excepted the land from the operation of the railroad grant; and that upon the cancellation of that entry the tract in question did not inure to the benefit of the company, but reverted to the government and became a part of the public domain, subject to appropriation by the first legal applicant."

The particular proposition determined in the Sanders case to which effort has been made to direct attention is found embodied in the following terse comment on it in the opinion in the Nelson case, namely :

"In the same case the court, after observing that as the lands there in dispute were not free from claims at date of definite location, it was of no consequence what was done with them after that date."

The Nelson case is identical in all essential respects with the case before the court. In that case, as in this, the land was unsurveyed at the time the map of definite location was filed. It was, however, at that time occupied by a settler with the bona fide purpose of entering the same under the homestead laws as soon as it should be surveyed. That condition, the court held, operated to exempt it from the grant. It was excepted out of it. The grant never attached to it.

Now, the only difference between the two cases is that in that case the homesteader continued to live on the land until it was surveyed, and when it was he promptly attempted to enter it. His application was rejected, the land office holding that the land passed to the railway company under the grant. But the supreme court of the United States reversed the supreme court of Washington, holding, as above indicated, that the claim or right of the homesteader was embraced within the language "other claims or rights," in the granting act, and consequently the company got no title to it.

But in view of the decisions of the supreme court adverted to, the fact that the homestead claimant in the Nelson case continued, after the filing of the map of definite location, to reside on the land and promptly applied to enter it when surveyed, is of no consequence. Suppose he had not? Suppose, as in the Dunnmeyer case or the Whitney case, he

had subsequently abandoned it. The railroad company could assert no title to the land. It would, as said in the Whitney case, have reverted to the government and become a part of the public domain, subject to appropriation by the first legal applicant.

Suppose he had continued to reside on the land, but had neglected to make his application to enter within the time limited by the act of May 14, 1880. By no possibility, under the repeated decisions of the supreme court, could the railroad company be advantaged under the grant here involved by his delinquency. He would subject himself to the risk of losing the land by reason of the filing of an application by some other qualified appropriator, but the railroad grant had become fixed and bound many years before, and he would be in no peril from it.

There is no difficulty whatever in distinguishing this case from

N. P. R. R. Co. v. Colburn, 164 U. S. 383.

In that case all that appeared was that at the time of filing the map of definite location the premises were occupied and cultivated by one Kelly. It was not shown that he made any claim to the land under any law of the United States, that he intended to enter the land as a homestead or pre-emption, nor does it appear from the opinion whether the land was surveyed or unsurveyed. If the land was surveyed and the ninety-day period

within which he was required to file had expired, even if he did occupy with intent to enter as a homestead or pre-emption, it might well be held that he had no longer any "claim" or "right" to the land, and that as against any beneficiary of a grant taking effect thereafter or any legal appropriator the land was public and free from "claim" or "right." The land office appears to have believed that it was decided in the Colburn case that in order to constitute a "claim" such as would operate to exclude a tract from the grant, such "claim" must be of record in the land office. The case certainly does not so decide. It simply holds that there was not enough shown to except the land from the operation of the grant.

But the Nelson case and the case of

Oregon & Cal. R. R. Co. v. U. S., 189 U. S.
103,

now to be adverted to, point out that the homesteader or pre-emption claimant on unsurveyed lands cannot make any filing in the land office, nor any record there, of his claim; and they hold that he cannot be prejudiced by the fact that he is afforded no opportunity under the law to make a record. It would be most unjust to the pioneer to allow his holding, which he subjugated before the railroad came, to be appropriated by it when eventually the land should be surveyed, by giving

to the word "claim" in the act a significance so narrow as to exclude his most meritorious claim.

The Oregon & California Co. case reasserted the doctrine of the Nelson case, the opinion of the Court in each being written by the same learned Justice.

In that case the company sought to select the lands in question under the lien provisions of the grant. They had been occupied previous to the survey by homestead settlers, and immediately thereafter the railroad selections were filed. Within the ninety-day period the homesteaders filed their applications, and it was held that they and not the railroad company, were entitled to the land. The case is here adverted to because it emphasizes the point decided in the Nelson case, that the "right" and "claim" of the occupant was not to be prejudiced by the fact that the lands were not surveyed at the date of occupancy.

Speaking of this case the brief of appellants herein says:

"Here the superiority of the occupants' right is expressly rested upon the fact that they moved within the period allowed them by the Act of May 14, 1880."

Quite right. It will be noted, likewise, by the court that the adverse right asserted was initiated after the survey had been made and before the expiration of the ninety-day period. If at any time between three months after August 10, 1891, and January 10, 1896, the appellant company had

selected these lands under the lieu provision of the grant, or a qualified homesteader had tendered a filing, or an application had been made to enter under any other law for the disposition of the public domain, the right of the appellee to the land would be gone. The case adverted to simply holds that his right to enter guaranteed to him by the statute at any time within the ninety-day period cannot be defeated by any person who endeavors to initiate a right within that time. If he complies with the statute, he gets the land though some one else beat him to the land office after the survey was made.

Reference was made above to the predicament in which Lammlein would have been had he continued to reside on the land and failed within three months after the land was surveyed to file his application to enter—namely, that the land would become subject to appropriation by any legal applicant. So, if this appellant railway company should, after the expiration of the three-months' period, select this tract with other lands under the lieu provisions of its grant or under the act of 1899, commonly known as the Mount Rainier Forest Reserve act, or any other act entitling it to select lands, its superior right could not be denied. It would be in the position of any other appropriator and the rights of Lammlein would succumb.

So with appellee Trodick. He did not apply to enter within the three months' period and if, after

that time and before he applied to enter, any legal applicant had filed on the land, his rights would be gone. But unless intervening rights have attached it is entirely immaterial how long he delayed about making his application.

That appellee's right to the land, except against claims initiated intervening the filing of the survey and his own application to enter, would not be prejudiced by any delay, was expressly ruled by this honorable court in

Whitney v. Taylor, 158 U. S. 85; and in
Lausdale v. Daniels, 10 Otto, 113.

The decisions of the land department as to this have been uniform. Settlement initiates the right, and under the statute application must be filed within ninety days after the survey. But delay in doing so is immaterial unless there are intervening rights.

H. B. McLean, 6 L. D. 653.

The same principle finds very general application.

The filing must be made within three months after settlement in case of pre-emptions, but delay in doing so is of no consequence unless meanwhile some one else has filed.

Johnson v. Toursley, 13 Wall. 72.

A pre-emption entry had to be completed within a

certain limited time after the filing of the declaratory statement, by making proof and paying for the land, but no right was lost by delay in doing so unless after the time limited and before the tender, some one else initiated a right to the land.

Chicago, Milwaukee & St. Paul Co., 9 L. D. 221.

J. B. Raymond, 2 L. D. 854.

It is likewise recognized in the law applicable to the disposition of mineral claims. The right is initiated by discovery and marking the boundaries and must be completed under the local laws by filing a certificate within a certain time. But delay in the filing of the certificate is unimportant unless some one else locates after the time allowed and before the record is made.

1 *Lindley on Mines*, 390.

So there was no reason to deny appellee's application to enter the land by reason of any delay on his part in presenting it after the survey. Indeed the land office recognized no objection to the application on that ground. The action of the Commissioner was based on the Colburn case, which clearly was not governing and was misapplied.

Because it might possibly be inferred from the language of some of the opinions of the Supreme Court of the United States in construing railroad

grants, as the Honorable Commissioner evidently inferred from the opinion in the Colburn case, that in order to constitute a "claim" within the meaning of the word as used in the excepting clause of the Northern Pacific grant, there must have been a land office record of it, the following is quoted from the later decision in the Nelson case, namely:

"As the railroad had not acquired any vested interest in the land when Nelson went upon it, his continuous occupancy of it with a view, in good faith, to acquire it under the homestead laws as soon as it was surveyed, constituted, in our opinion, a *claim* upon the land within the meaning of the Northern Pacific act of 1864; and as the claim existed when the railroad company definitely located its line, the land was, by the express words of that act, excluded from the grant."

And then, having referred to the lands excepted as being such as are subject to "other claims or rights" than pre-emption claims, and to the language of the lieu clause granting the right to select in place of tracts "occupied by homestead settlers", the opinion continues:

"The words 'occupied by homestead settlers' show that congress intended by the charter of the Northern Pacific Railroad Company—whatever it may have intended as to other companies receiving grants of public lands—that occupancy by a homestead settler, with the intention to take the benefit of the homestead laws, constituted a *claim* which, existing at date of definite location, would exclude from the grant land that might otherwise be covered by it. * * * If it be said that Nelson's

claim was that of mere occupancy, unattended by formal entry or application for the land, the answer is that that was a condition for which he was not in any wise responsible, and his rights in law were not lessened by that fact. The land was not surveyed for twelve years after he took up his residence on it, and under the homestead law he could not initiate his right by formal entry of record until such survey."

And then the court shows the inapplicability of the case of *N. P. R. R. Co. v. Colburn*, distinguishing it by the fact that in that case the settlement was made upon surveyed land and that the occupant had not made his filing prior to the filing of the map, though he had an opportunity to do so.

The appellants, admitting that if the land in question was occupied by a *bona fide* homestead settler on the 6th day of July, 1882, intending to file as soon as the land should be surveyed, it was excepted from the grant to the Northern Pacific Railroad Company, advance the contention that either the fact of occupancy or the *bona fides* of the purpose of the settler to enter is to be determined, not by evidence such as would ordinarily be considered as tending to establish such facts, but by whether the land office record shows, within three months of the filing of the plat of the survey, an entry by the person occupying the land at the time of the filing of the map of definite location. Nothing that was

said in the Nelson case nor anything that can be gathered from the earlier decisions of this court, lends any support to such alleged rule of evidence.

It is true the learned Justice writing the opinion in the Nelson case makes reference a number of times to the fact that the settler made his filing as soon as the land was surveyed. That was one of the facts of the case. It was a circumstance clothing his case with a special equity. It would have been harsh indeed to take from him, under those circumstances, the home he had established and improved before the railroad company had earned any right to the land by preparing to build into the region in which it lay.

But there is absolutely nothing in anything that was said by the court or in the conclusion that was reached that could lead to the conclusion that the fact adverted to was vital to the case, and the reasoning by which the court awarded Nelson the land forbids the belief that it was vital to the case. The line of reasoning compels the conclusion that the railroad company's right to the land was utterly gone years before, that it never did attach, by reason of his occupancy at and prior to the filing of the map of definite location. And there is nothing that can possibly induce the belief that the company's right being gone, the court considered his own right to the land would be any the less clear though he had delayed beyond the three months' period in making his filing.

The court referred to the fact that he did apply to enter as soon as the plats were on file, rather to show that though entrymen in general occupied a position of so much equity, the construction of the grant contended for by the railroad company would deny to them the land that had been made valuable by their pioneer efforts.

The fact was by no means vital, but it was important as showing the inequity that would be wrought if any construction other than that given the grant by the court should be adopted.

There are many reasons for rejecting the rule of evidence which appellants seek to have established.

In the first place there is no sort of relation between the recitals of the application to enter by a homesteader, filing in 1891, and either his occupancy in 1882 or the *bona fides* of his intention to enter the land as a homestead when surveyed.

The application to enter as a homestead, unlike the declaratory statement of a pre-emptioner, says nothing at all about when the applicant settled on the land.

Sec. 2290, R. S. U. S. (As amended by Act of 1891.)

The pre-emptioner could not file his declaratory statement until he had settled on the land. The homesteader files as the initial act in the acquisition of title, though in a contest with another claim-

ant he may insist on a right to the land as of his date of settlement, if that antedated his filing.

It is strange that the absence of an official document which says nothing at all about settlement or occupancy, even at the time it is filed, should be deemed conclusive proof that land was not *occupied by a homestead settler* nine years before.

Reference is made in this connection to

N. P. R. R. Co. v. Colburn, 164 U. S. 383.

In that case it was not held that the want of a filing in the land office was proof either of non-occupancy or want of good faith. The land had been surveyed. Under the circumstances an opportunity existed to file and the occupant did not file. The holding was that the rights of the railroad company having attached while the occupant was in default, he was to be deemed to have no claim, just as if the map of definite location in this case had been filed after 1891, the complainant would be deemed to have no *claim* to the land.

In

N. P. Ry. Co. v. DeLacey, 174 U. S. 622,

the ruling was quite in keeping with the same theory.

The court held that though there appeared on the records of the land office at the time of the filing of the map of definite location a pre-emption declaratory statement, as the time had gone by within

which proof should have been made when the map was filed, its vitality was gone and it could not be considered as constituting a claim.

The holding in these cases was not that the absence of the requisite record was conclusive proof of non-occupancy, abandonment or want of good faith, but that under the circumstances whatever claim there ever had been had expired, no longer existed at the critical period,—the date of filing the map.

The real ground upon which the lower court decided the DeLacey case was that though the record showed the existence of a pre-emption filing at the time the map was filed, it could be and was shown that the settler had actually *abandoned* the claim before that time.

N. P. Ry. Co. v. De Lacey, 66 Fed. 450.

Inferentially, at least, it held that the fact of a subsisting claim at the time of the filing of the map of definite location, of occupancy, and every other fact entering into the question, could be shown by any relevant testimony.

The case of

Tarpey v. Madsen, 178 U. S. 215,

may as well be mentioned here, since some support for the position of the appellants is claimed for it. In that case the map of definite location was filed October 20, 1868. At that time there was no land office in which the pre-emptioner could file. The

office was opened some time in April or May, 1869. On May 29th, one Olney filed a pre-emption declaratory statement, alleging settlement April 23, 1869. It will be noticed that the date of settlement *as recited* was after the filing of the map. Olney afterwards abandoned the land and Madsen homesteaded it after it had been *for years in the possession of the railroad company*.

The court held that waiving the question as to whether it could be shown that Olney had, in fact, contrary to the recital of his declaratory statement, settled on the land prior to October 20, 1868, as the evidence tended to show, there was nothing in the record to establish, as a fact, that his occupancy of the land prior to that date was with intent to acquire title to it from the United States.

None of these cases afford any support to the novel rule of evidence which the appellants assert.

To resume the discussion of the reasons which forbid its acceptance.

Proof that a man did not make a filing upon a certain tract of land in 1891, except by operation of an arbitrary rule of law, is certainly no proof that he did not occupy it in 1882, and is only the feeblest kind of evidence, if it is evidence at all, that occupying it, if he did in 1882, he then had no *bona fide* purpose to enter it.

He had abundant time meanwhile to change his mind. Any one familiar with the development of

our country knows how often the settler has taken up his residence upon a piece of land, filled with hope and the fixed purpose of acquiring title to it, and after attempting for a time to make a living off it, and then giving up the struggle has abandoned it, leaving the land to be taken again, possibly, by later comers.

Even if Lammlein had abandoned this land, say in 1889, as is charged in the brief of appellants, that fact would not establish that he did not have a *bona fide* intent to acquire the land in 1882. But he died before the land was surveyed and sold the place on his death-bed to appellee. Had he continued to live on the land until after 1891 it might be permitted to submit in evidence that his failure to enter *promptly* when he had an opportunity was evidence that he never intended to enter. But he died and, anticipating his death, sold the place. Certainly Trodick's failure in 1891 to enter is no proof that Lammlein had no intention in 1882 to do so.

The rule contended for would give to the railroad company the benefit of the labor and toil of every settler going on an odd-numbered section before the survey and the advent of the railroad, if he happened to die after the filing of the map of definite location, while waiting for the government to complete the survey.

If the only competent evidence of the good faith

of the occupant at the time of the filing of the map of definite location is, as contended, the making of a filing by the party who occupied the premises, within three months after the survey is filed, such proof must inevitably be wanting if he dies meanwhile.

Oftentimes land so appropriated and improved by the pioneer becomes of great value before the survey.

To the foregoing argument advanced before the Circuit Court of Appeals, it is answered, in the brief filed in this court, that it is without weight because by reason of the provisions of Section 2291, the widow of a settler, or, in case of her death, his heirs, may make proof and obtain a patent to his homestead. But this is a palpable error.

Section 2291 of the Revised Statutes of the United States contemplates the case of a tract which has been *entered*, on which a claimant has made a filing, of which he has made entry according to the provisions of Sections 2289 and 2290.

A homestead entry cannot be made of unsurveyed land, and there is no entry until the claimant has complied with the provisions of Section 2290.

Hastings v. Whitney, 132 U. S. 357.

The discussion does not concern itself with one so circumstanced, but with one who has made a settlement, but who, by reason of the fact that the land

is unsurveyed, has been denied the opportunity to make an entry.

A homesteader acquired no rights by virtue of any settlement he made on the land until the act of 1880 was passed.

Section 2291 was in existence prior to the date when it came into being and, of necessity, could not reach the case of one whose only rights are such as he enjoys under the act of 1880. There is no provision in the law for the devolution of the preference right of entry given by the act of May 14, 1880. Doubtless if the widow was residing on the land at the time of the death of the claimant, she would be held to have initiated a residence and settlement in her own right immediately. If she lived apart from her husband she could make no such claim. Anyway the instant he died, under the rule contended for by the appellants, the claim of the railroad company would attach to the land, as no one could assert any claim because of *his* settlement—his widow and heirs being in no better position than strangers.

This was what was decided, and all that was decided, in

Burton v. Traver, 130 U. S. 232,

cited by appellants as another case "directly in point."

The logic of the opinion in that case forbids any

such conclusion as is sought to be drawn from it by the appellants. The pre-emption right, it holds, is in the nature of a continuing offer by the government to the settler, to the effect that he shall, if the land is not meanwhile withdrawn from sale, have the first right to enter it, upon the survey being made and returned.

If we assume that continuously from the time he settled on the land in question until he died, and uninterruptedly after the filing by the railroad company of its map of definite location the government was promising Lammlein that as soon as this tract of land was surveyed he should have the right in preference to any one else to enter it, we must likewise assume that the land continued after 1882 to be public land, which the government had a right to dispose of, not land which it had already disposed of to the railroad company.

The whole theory of the brief to the effect that there is some unbending rule of evidence that the "good faith" of the settler, the *bona fides* of his occupancy at the time of the filing of the map of definite location, can be established only by the fact of his making a filing in the land office within the time limited by law, after the survey, has no better support than the bare comment of Mr. Justice Harlan in the Nelson case, in his reference to the Colburn case, to the effect that the lands therein brought into question *being surveyed* the "good

faith of the occupation had not been manifested by an entry or an attempt at entry at any time in the local land office."

Undoubtedly, if the land was surveyed at the time the alleged settlement was made, the omission to make entry at once would be the strongest kind of evidence that the occupant had had no *bona fide* purpose to enter. Likewise if the survey was made very shortly after he went upon the land, his neglect to file would be persuasive evidence that he had not theretofore entertained any fixed purpose to enter. But if the survey was not made until he had resided continuously on the land with his family, for fifteen years, improving and cultivating it, declaring repeatedly his purpose to enter the land as a homestead, it would be a queer rule of law that would deny to him the land because of *want of good faith*, simply because he allowed the period limited by statute after the survey to lapse before making his filing. He might lose the land, and of course he would if any right was initiated before he tendered his filing, but he would lose it, not because of the want of good faith in his settlement or occupancy, but because of a fixed provision of the law which renders useless to him the very best faith, the utmost of honesty in intention. He may have deferred because he had not learned of the surveys, or because, being aged and unlettered, like the appellee in this case, he was uninformed or unmindful of the

necessity of filing promptly upon the making of the survey. He loses the land to any one securing an intervening right, but not because of any lack of *bona fides* on his part.

But it is not only in cases where death intervenes that the railroad would enrich itself through the labor of others under the rule contended for.

In every case where the original occupant sold his place a similar result would ensue. In fact, that is just what is claimed in the brief in this case, that Lammlein having sold the place, he thereby abandoned it and disqualified himself from entering it, so it belongs to the railroad company. Congress never could have intended to work such oppression. It would be a wanton disregard of the rights of a most deserving class of citizens if the sale of his holdings by a settler, prior to survey and after the filing of the map of definite location, should operate to devote the land, against the claims of his successor, to the railroad company. Such a holding would, of course, forbid all such sales. If old age and incapacity came before the survey, the settler could not dispose of his holdings, or let any one into possession. By the very act of his attempted disposition the railroad right attaches. This will not do.

As shown before, the transfer of the right of possession, acquired by settlement, is sanctioned by the repeated adjudications of this court, though, of

course, the transferee cannot hold the land unless he is a qualified entryman and intends *bona fide* to file upon it as a homestead.

The same considerations forbid the belief that in the act in question a rule of evidence was established that accomplishes the same result as an express provision so extending the grant.

Finally the inadmissibility of this arbitrary rule of evidence is apparent if we conceive of an action brought by the Northern Pacific Railway Company against Lammlein, at any time between 1882 and 1889, to enjoin the latter from cutting timber from the land in question with which to construct a house or barn, or for the purpose of clearing it with a view to its cultivation. Certainly Lammlein could have shown in that action that the tract in question was excepted and he could show the facts which brought it within the exception. The company would have been defeated because it would appear that it had no inceptive title to the land. But if it had no title in 1886, say, it had none at any later date.

It is unnecessary to comment on the authorities cited at pages 8 and 9 of appellants' brief to support the claim that the "good faith" of a homestead claimant can be shown only by a land office record.

There is nothing in any of them that even remotely refers to the subject of "good faith." They are all such cases as might have been cited by the appellant in the Nelson case to the effect that the

land is not burdened with any kind of a claim at all,—so as to except it from the grant, as was claimed therein. They may have some relevancy to such a claim, but they are wholly inapplicable to a discussion as to how “good faith” on the part of a homestead occupant may be shown.

Nor is there anything in the remark quoted from the opinion of this court in

United States v. C. M. & St. P. Ry. Co.,
(Adv. Sheets U. S. S. C. Dec. 15, 1910,
page 7)

that gives any support whatever to such supposed rule of evidence.

The controversy between the parties is brought out clearly by the remark made in the brief in connection with the reference to the act of May 14, 1880, at pages 10 and 11. There we read:

“That act simply gave to the homesteader the same period of grace previously enjoyed by the pre-emptor within which to make his entry; and indisputably if such an entry had been made by Lammlein or by his heirs within three months after the plat of survey was filed, *the railroad company would have lost its right to the land.*”

The appellee maintains that the railroad company could *lose* no right to the land, for it never had any. It never had any by reason of the conditions that existed in 1882. It either, on filing the map of definite location, acquired a perfect and indefeasible

title or it got none at all. The language used implies that it got some kind of a title, likely to be terminated upon a condition subsequent. The whole course of the decisions construing these grants is against any such contention, and it is equally at variance with the whole argument of the brief preceding,—which is to the effect that the equitable title was acquired or was not acquired by the railroad company, *ipso facto*, on the filing of the map of definite location, but that in a subsequent contest between it and a homesteader, the only evidence by which he could be permitted to establish his good faith and the *bona fide* character of his settlement would be his filing in the land office, which, as shown, would not contain even a recital of his settlement or occupancy prior thereto at any time, much less the good faith thereof.

No such force can be given to the decision in

Water & Min. Co. v. Bugbey, 96 U. S. 165,

as is claimed for it. If it were "exactly in point" it would be flatly contradictory to the conclusion reached in

Kansas P. Ry. Co. v. Dummejer, 113 U. S. 629.

In fact it was appealed to in the last mentioned case, and the governing feature of it shown so clearly that no room was left for mistaking what it decided. The grant of Sections 16 and 36 to the

State of California for school purposes was made by the act of 1853, but, of course, the title of the government was not divested until the sections were identified by the survey. A clause in the act making the grant, excepted lands on which there was "any settlement by the erection of a dwelling-house, or the cultivation of any portion." One Bugbey had made a settlement on a tract which became a part of a certain section sixteen when the survey was made May 19, 1866, and in less than a year thereafter, never having attempted to enter the lands as a part of the public lands of the United States, never having "sought to establish any right by reason of this settlement . . . under the general pre-emption law," and, so far as the record discloses, never having intended to do so, on the 22d day of April, 1867, he acknowledged the full title of the state to the land and purchased the place of it. A ditch company which had constructed a canal across the land claimed title by virtue of the act of July 29, 1866, granting to owners of ditches the right of way over the "public lands." The court held that inasmuch as Bugbey, though actually on the land, was asserting no right to it adverse to the state, was not claiming any right to the possession by virtue of any law of the United States, was not a *bona fide* settler intending to purchase from it, and shortly after the survey acknowledged the title of the state by buying from it, the land was not to be

regarded as "public land" and so open to the operation against him and in favor of the ditch company, of the act of July 29, 1866, but that on May 19, 1866, it had become the property of the State of California. All this appears more clearly, perhaps, from the opinion in the *Dunmeyer* case than from the report of the *Bugbey* case itself. It affords no sort of justification for the claim made that if years after the filing of a map of definite location, when the surveys are made, a settler does not file, he is to be conclusively regarded as a trespasser from the beginning.

If the surveys had been made promptly after the year 1882, and Lammlein had then omitted to file, but on the contrary had bought from the railroad, and then a controversy had arisen between him, claiming under the railroad title, and a stranger claiming the land upon the ground that the railroad never acquired title by reason of his occupancy, and there was no evidence going to show that his occupancy was accompanied by a purpose to enter the land as a homestead, the case would be "exactly in point." As it is, it contributes little if anything to the solution of the question which confronts the court.

It was appealed to likewise in

Whitney v. Taylor, 158 U. S. 85,

in support of the proposition that lands occupied

by a pre-emption or homestead claimant at the time of the filing of the map of definite location passed to the railroad company under its grant, should the land afterwards be abandoned by the settler, but this court refused, in those cases, to subscribe to that doctrine, saying in *Whitney v. Taylor*:

“This contention was denied, the court holding that the condition of the title at the date of the definite location determined the question as to whether the land passed to the railroad company or not.”

It has been insisted that in view of the construction given to the grant and the principles controlling in the decisions referred to, it is immaterial whether any relationship is traced between Lammlein and Trodick; that the lands continued public lands free from any claim upon them by the railroad company by reason of the conditions existing when its map of definite location was filed, and that upon the subsequent termination of the claim of Lammlein, they were open to the first *bona fide* settler who should occupy them, and to entry as other public lands.

And yet it may be important, perhaps, in this action in equity in which it is sought to divest the railroad company of an apparent title to which it has no right, that there never was a time since prior to the date when its grant became fixed that the

lands were in the possession of the railroad company,—never a time when they were not in the adverse occupancy of either the appellee or Lammlein, who reclaimed and improved them, appellee paying \$500 for the improvements placed upon them by Lammlein. The occupancy of the premises by the appellee and by Lammlein would have been notice to any intending purchaser of the land from the railroad company, either before or after patent, of their rights. It is a universally acknowledged principle of the law of notice that possession and occupancy of real property is as effectual as notice to purchasers as is any record.

Mullins v. Butte H. Co., 25 Mont. 525.

There never was a time after the company might, under any circumstances, have asserted title to this land that any intending purchaser supposing the railroad company to have title, would not have been disabused of such view by taking the precaution which is imposed on every person contemplating purchasing land to inquire of the occupant, if there is one, by what title he holds.

Nor in the problem of the construction to be given to the grant ought any particular weight to be given to the argument evidently, from the opinions, adduced repeatedly before this court to support the contention of the railroad company that insecurity must attend titles under its grant unless it can be

determined from record evidence what tracts were and were not granted.

At every stage in the history of the litigation over this particular grant this argument has been made. It was urged with special insistence in the Barden case, and predictions of disaster should the court hold that no mineral lands were excepted from the grant save those known to be such at the time of the filing of the map of definite location by the company were freely made by counsel representing it. The communities affected do not seem to have suffered the catastrophe prophesied.

Equally groundless are the present prophecies of evil.

While any land within the limits of the grant remains unpatented it is eminently fitting that the land department should, on the suggestion of any one interested, listen to a contention that any particular tract was subject to a valid claim at the time of the filing of the map of definite location, and that, for that reason, the railroad company has no right to it. That was why the act provided for the issuance of patents,—namely, that the department might make such inquiries as it might in any manner be prompted to start, as to whether any particular tract within the place limits was, for any reason, excepted from the grant. This is the principle on which the Barden case was decided.

The brief of the appellants gives much too narrow a scope to that decision. It is true the court held that the land department was charged with the duty of inquiring as to whether any lands to which patent was sought by the railroad company were or were not *mineral in character*, and to issue or to withhold the patent accordingly as it determined; that, in consequence, the question of whether any specific lands were non-mineral and passed to the railroad company under its grant, or were mineral and did not pass, was left open until patent finally issued, up to which time mineral locations might lawfully be made and maintained. It is true the court held that the land department might thus inquire into the *physical character* of the ground. But why did it so hold? It was because of its more comprehensive conclusion that the land department was empowered and charged with the duty to inquire whether the lands sought to be patented were such as, by reason of the provisions of the act, the claimant was entitled to take.

The Northern Pacific Railroad Company was not entitled to take mineral lands under its grant. Hence the land department was called upon to inquire, on its application for patent to any specific tract, whether the land was of that character. It was likewise denied the right to take, under the act, any lands which were subject to "pre-emption or other claims or rights" or that were "occupied

by homestead settlers" at the time the line of the road was definitely fixed.

Why should that not equally be made the subject of inquiry by the land department?

The principle of the decision is expressed in the following from the opinion:

"It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition or mistake, its determination is conclusive against collateral attack."

The quotations made by the court from its earlier decisions clearly elucidate the proposition that the scope of the inquiry imposed upon the land department is by no means confined to the "physical character" of the land. Thus, the following from

Steel v. St. Louis Smelt. & Ref. Co., 106 U. S. 450:

"Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale."

And then the court continues, as though it were not open to disputation, that it must make the very inquiry contemplated here:

“If the Land Department must decide what lands shall not be patented *because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption or other claims or right* at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands.”

Such a hearing seems to have been ordered in respect to this particular tract before the patent issued to the railroad company, but on the coming in of the testimony it was ruled by the Commissioner, as a matter of law, that the title passed to the railroad company on the filing of the map of definite location, because there was no claim of record in the land office, following what was supposed to have been ruled in the Colburn case.

The railroad company certainly ought not to be heard to complain if when it applies for patent, the land office calls for information as to whether the land was occupied by a *bona fide* homesteader or was subject to any other claim at the time of filing the map of definite location, or to the refusal of the department to issue it a patent for the land if it is determined that it was so subject.

A purchaser of the land from the railroad company before the patent issues ought not to be heard to object, because he knows that under the law the apparent title is subject to be defeated by evidence on the application for the patent that the railroad company has, in fact, no title to the land.

There is no hardship at all on the railroad company in this, and there is no more uncertainty in any title **derived** from the railroad company before patent issues than there is in a title derived from any other claimant of land to whom patent has not issued. Every purchaser in that position takes the chance that patent may never issue.

Harley v. Diller, 178 U. S. 476.

The government may at any time start an inquiry that may result in the conclusion that the party who seems entitled to a patent has no real claim to the land at all.

When the patent does issue, it is subject to attack only by some one who before it issued put himself in a position before the land office to demand and require that it go to him instead. The equity action cannot be maintained by any other.

It is true that it may be a long time before the company gets patent for any particular lands. The surveyors may be delayed and the congestion of work in the land office may result in delays thereafter. The necessary inquiry as to whether the land is mineral in character may be deferred from time to time by reason of the want of appropriations to carry on the work of inspection. All these things may be true. But they are equally true with reference to applications for patent under any act of Congress. The writer located some public lands under the lien provisions of the

forest reserve act, over ten years ago, and no patent for them has yet issued. That act necessitates an inquiry by the department as to whether the lands claimed are "vacant."

2 Comp. Stat. 1541.

Why should there be a rule by which the certainty of title in the railroad company under its grant should be fixed at some time anterior to the issuance of the patent, while in the case of any other law for the disposition of the public domain the right of the claimant remains open to inquiry until the patent issues? Really, the right of the railroad company does remain open, as ruled in the Barden case, until patent, so far as that right depends upon the character of the land. What the appellants really contend for is that its title remains open so far as the character of the tract is concerned with reference to its being mineral or otherwise until the patent issues, but that its character as to whether it was or was not subject to pre-emption or other rights or occupied by homestead settlers ought to be determined at some earlier time.

The Colburn case affords no warrant for the contention that such a distinction does exist or ought to exist. Whether the land is surveyed or unsurveyed, the question of whether it is reserved or is not reserved for any reason, is open until the issuance of the patent. That case simply holds that

in the case of a tract of land that had been surveyed, prior to the filing of the map of definite location, but which, though occupied, had never been filed on by the occupant, the land department would err, as a matter of law, in holding the land subject to a valid claim at the time of the filing of the map.

The grant to the Northern Pacific Railroad Company was of a vast domain. The plainest principles of justice demanded that it should not absorb the modest holdings and improvements of those who had gone on the frontier to tame its wildness in advance of the coming of the railroad road.

Congress was determined that it should not have, as it seeks to appropriate by its patent, the fruits of the labor and expenditures of Lammlein in subduing this land. It was recognized that when surveys are delayed many years, as they were in this case, pre-emptioners and homesteaders frequently relinquish their possessions and improvements to later comers, effecting a sale, for all practical purposes, as though they had title. There was good sound reason for not providing by the act that in the event that land should be claimed at the time of the filing of the map of definite location and so excepted from the grant, yet if for any reason the right of the occupying claimant

should thereafter be terminated before patent, the land should become subject to the grant. Congress recognized that the settler had probably done as much in his way towards the development of the country as the railroad was to do, and it did not propose to put an embargo on his disposing of his possessions and his improvements should old age overtake him before the survey was made or other necessity, or even his interest prompted him to sell.

It got a great grant, as stated. It was not intended that it should reap what others had sown. It became necessary to except in general terms lands subject to claims or rights. Certain embarrassments to the railroad company necessarily ensued by reason of the exception—the embarrassment of being met when it applied for patent by proof, any legitimate proof, that any particular tract was excepted from the grant.

Before it got its patent in this case the appellee caused the proper inquiry to be made, with the result stated.

He could only bide his time, maintaining his possession of the land until patent issued and then appeal to the courts. This he did.

II.

ALLEGED INSUFFICIENCY OF BILL.

It is urged, however, that the decree is erroneous because there is no proof that appellee is not the

owner of one hundred sixty acres of land. No reference is made to any part of the record showing that such alleged defect in the proof was presented when the omission might have been supplied. There appears to be no question about the fact. The Commissioner rejected appellee's application on no such ground. Presumably his filing papers were in due form. The appellants made no answer that appellee was not entitled to the land because he was already the owner of one hundred and sixty acres of land, or because he was such at the time he applied to enter, or that his application was rightly rejected for that reason.

The record being altogether silent upon the subject, it becomes a question as to whether non-ownership of 160 acres of land must be pleaded and proved by appellee or whether the appellants must aver such a condition in order to defeat the action.

By well established rules of pleading it was not incumbent on the appellee to plead this negative.

Section 2289 of the Revised Statutes, as amended by the Act of 1891, reads as follows:

“Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the

proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres."

It will be observed that the qualifications of a homesteader are set out in the earlier part of the section, and then a proviso is inserted denying to any one the right to enter a homestead who is the owner of more than 160 acres of land in any state or territory.

The question as to when one pleading rights under a statute must negative the existence of conditions expressed in a proviso under which the right can not be asserted has been often considered. It has usually presented itself in connection with criminal statutes, but the principles are equally applicable in civil actions asserting rights founded on statutes.

United States v. Cook, 17 Wall. 168,

is a leading case.

In that case Mr. Justice Clifford, speaking for the court, says:

"Where the exception itself is incorporated in the general clause, as is supposed in the alternative rule there laid down, then it is correct to say, whether speaking of a statute or private contract, that unless the exception

in the general clause is negatived in pleading the clause, no offense, or no cause of action, will appear in the indictment or declaration when compared with the statute or contract; but when the exception or proviso is in a subsequent substantive clause, the case contemplated in the enacting or general clause may be fully stated without negativing the exception or proviso, as a *prima facie* case is stated, and it is for the party for whom matter of excuse is furnished by the statute or contract to bring it forward in his defense.

“Commentators and judges have sometimes been led into error by supposing that the words, ‘enacting clause,’ as frequently employed, mean the section of the statute defining the offense, as contradistinguished from a subsequent section in the same statute, which is a misapprehension of the term, as the only real question in the case is, whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense. Such an offense must be accurately and clearly described, and if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading; but if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is matter of defense and must be shown by the other party, though it be in the same section or even in the succeeding sentence. 2 Lead. Cr. Cas., 2d Ed., 12; *Vavasour v. Ormrod*, 9 Dowl. & Ry., 599; *Spiers v. Parker*, 1 T. R., 141; *Com. v. Bean*, 14 Gray, 53; 1 Stark. Cr. Pl., 246.

“Few better guides upon the general subject can be found than the one given at a very early period, by Treby, Ch. J., in *Jones v. Axen*, 1 Ld. Raym., 120, in which he said, the difference is, that where an exception is incorporated in the body of the clause, he who

pleads the clause ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause and leave it to the adversary to show the proviso; which is substantially the same rule in both its branches as that given at a much more recent period in the case of *Steel v. Smith*, which received the unanimous concurrence of the judges of the court by which it was promulgated."

The entire applicability of this language to the solution of the problem before us will be apparent when Section 2290, R. S. U. S., as amended by the act of 1891, is considered. The preceding section having defined the homestead right, this one sets out the contents of the affidavit which the applicant must file to assert the right.

He must make affidavit of his qualification to enter, reciting the facts as required by Section 2289, but not a word is said in the affidavit required, the substance of which in detail is set out, about his not owning more than 160 acres of land in any state or territory.

The principles announced in *United States vs. Cook* were applied in a civil action in

Miller v. Shields, 8 L. R. A. 406,

in the opinion in which numerous cases are referred to showing the generality of its application.

The Court of Appeals of the State of New York was guided by the same rule of pleading in an

action brought to recover of certain stockholders of a corporation a liability imposed upon them by statute.

The case of

Rowell v. Jaurrin, 151 N. Y. 60,

is particularly pertinent because the exception or proviso came into the statute by amendment.

The works on pleading in civil cases announce the rule substantially as declared by the Supreme Court in the case of *U. S. vs. Cook*.

Bliss on Code Pleading, (3d Ed.) 202.
Shipman's Common Law Pleading, 229.

Many other conditions besides the appellee's land wealth, if he were so encumbered, would operate to deny to him the right to make a homestead entry. If he had ever made a filing before he could not make a valid new one unless his right was restored.

In view of the provisions of Section 2290, he would not be entitled to the land if he had made any agreement to transfer it or if he intended it should be for the benefit of some one other than himself.

Under another provision of the statute—the Act of August 30, 1890—no single individual is entitled to enter more than three hundred and twenty acres of public land in the aggregate.

If the appellee had, prior to the time he applied

to enter the land in question and after 1890, acquired three hundred and twenty acres of public land under the desert land act, he could not make a valid homestead filing.

But it surely can not be maintained that he must negative in his bill the existence of all possible conditions under which, if existing, he would be denied a homestead entry. If such a state of facts existed, the appellants should have pleaded and proved it.

However, if the court should regard the omission of the negative averment important, final decree ought not to be awarded against the appellee. The order should accord him the opportunity to amend the bill so as to obviate the defect. The learned judge who presided at the trial filed an opinion, which is found in the record at page 531.

It will be seen that he denied the relief asked on no such technical ground. If his attention was ever called to the matter at all, which seems improbable, it is quite evident that he attached no importance to it. If the averment in an amended bill should be traversed, the testimony would be confined to the issue thus made.

Though no decree can stand which is supported only by a vitally defective bill, yet it is not at all uncommon for an appellate court, when the merits of a case appear to be with a complainant

whose bill has been dismissed, to reverse the decree with directions to permit an amendment. Such a disposition was made of

Ruby v. Atkinson, 71 Fed. 567.

The subject was considered and the practice vindicated in

Erans v. Hughes, 54 N. W. 1049.

The opinion refers to many cases in which it was pursued. Most of these, perhaps, were appeals from orders sustaining demurrers, but judgment had been entered in the case of

Rigg v. Parsons, 2 S. E. 81.

In that case the court said:

"If nothing else appeared in the judgment and order of the court below, we would, notwithstanding the fact that its ruling was not erroneous in sustaining the demurrer, reverse the judgment, and remand the case, with leave to the plaintiff to amend his declaration if he elects to do so, since we can plainly see that it could be amended so as to avoid this ground of demurrer. *Baylor v. Baltimore & O. R. Co.*, 9 W. Va. 270; *Norris v. Leven*, 28 W. Va. 336."

But the usual course was departed from because it appeared that the plaintiff had declined to amend. But even in such a case the judgment was reversed with leave to amend in

Dist. of Columbia v. Ball, 22 App. D. C. 543.

This court has repeatedly acted in accordance

with the procedure which it is insisted should be observed if the bill is believed to be defective, as is shown by the opinion in

Van Doren v. Penn. R. Co., 93 Fed. 260.

In

Scruggs v. Endom, 123 La. 887,

the plaintiff was defeated because his testimony was excluded on an objection to the petition. The appellate court held that the objections urged were well taken, but refused notwithstanding to affirm the judgment and reversed it with directions to permit an amendment.

“If possible, the court must not allow justice to be defeated and wrong to triumph, by a mere mistake or unskillfulness in pleading. A court of equity must always aim to act upon broad principles of justice, disentangled as much as possible from little technicalities.”

Ogden v. Thornton, 30 N. J. Eq. 569-572.

“Even appellate tribunals will reverse an order or decree and send a cause back to the court having original jurisdiction, in order that an amendment may be made, so that the real merits of the controversy may be settled. *Kuhl v. Martin*, 2 Stew. 586; *Walker v. Armstrong*, 8 DeG. M. & G. 534; *Lewis v. Darling*, 16 How. 6; *Lum v. Winn*, 4 Desauss. 6.”

Id. 573.

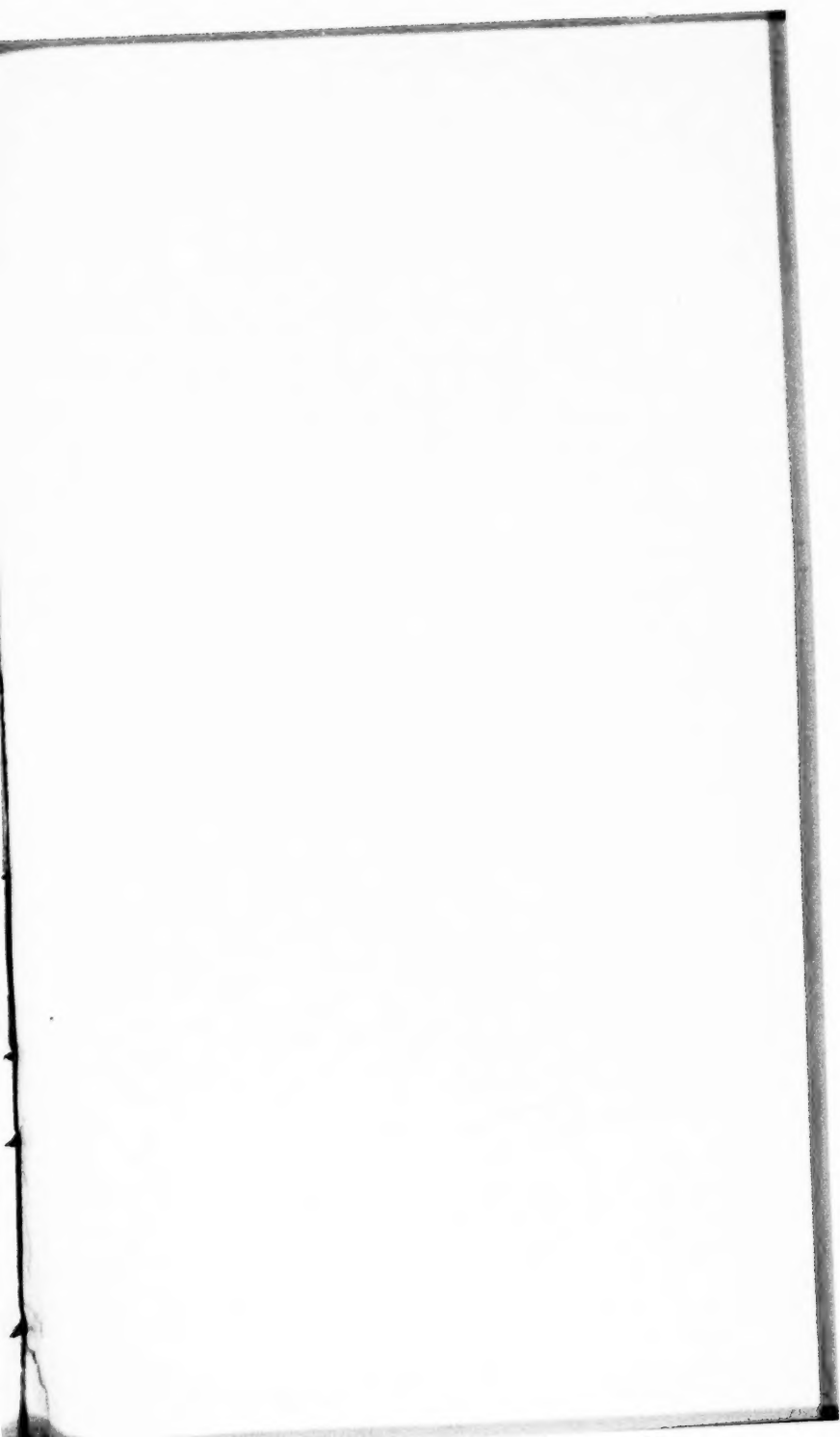
In equity the appellants have no just claim to

this land. It is gratifying to know that the law
does not award it to them.

Respectfully submitted,

WALSH & NOLAN,
Solicitors for Appellee.

THOMAS J. WALSH,
Counsel for Appellee.



NORTHERN PACIFIC RAILWAY COMPANY v.
TRODICK.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

No. 117. Argued April 11, 1911.—Decided May 15, 1911.

Land within place limits of the Northern Pacific Land Grant Act of July 2, 1864, c. 217, 13 Stat. 365, actually occupied by a homesteader intending to acquire title, did not pass by the grant but were excepted from its operation, and no right of the railroad attached to such lands when its line was definitely located. *Nelson v. Northern Pacific Railway*, 188 U. S. 108.

Where a *bona fide* settler was in actual occupation of unsurveyed lands at the time of definite location of the line, the land occupied was excepted from the grant; and if, before survey, he sold his improvements to one who also settled on the land intending to apply for title under the homestead laws of the United States, the claim of the latter is superior to that of the railroad company notwithstanding the original settler had no claim of record.

A settler in actual occupation before the location of the definite line of

221 U. S.

Opinion of the Court.

the railroad can stand upon his occupancy until the lands are surveyed, and his claim cannot be defeated by the railroad assuming without right at a date prior to his application to assert a claim to the lands.

Under the act of May 14, 1880, c. 89, 21 Stat. 140, delay on the part of a homesteader in making application after survey cannot be taken advantage of by one who had acquired no rights prior to the filing; and so *held*, that where the Northern Pacific land grant had not attached on account of actual occupation, delay on the part of the settler in filing after survey did not inure to the benefit of the company.

Nelson v. Northern Pacific Railway Co., 188 U. S. 108, was not modified by *United States v. Chicago, Milwaukee & St. Paul Railway*, 218 U. S. 233, as to the rights of *bona fide* settlers which attached prior to definite location.

Where, by error of law, the Land Office incorrectly holds a party is entitled to patent and issues it, the courts can declare that the patent is held by the patentee in trust for the party actually entitled to have his ownership in the lands recognized.

THE facts, which involve the rights of settlers on the public lands and those of the Northern Pacific Railroad Company under the act of July 2, 1864, are stated in the opinion.

Mr. Charles Donnelly, with whom *Mr. Charles W. Bunn* was on the brief, for appellants.

Mr. Thomas J. Walsh for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

In this suit, involving the title to the southeast quarter of section 35, township 15 north, range 4 west, in the State of Montana, the defendants McDonald and Auchard, now co-appellants, claim title under patent issued by the United States to the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company to which a grant of lands was made by the act of Congress of